The Ohio State University Dispute Resolution in Special Education Symposium Panel

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I. INTRODUCTION

Students with disabilities make up 13% of our nation's public school population.[1] The 2014 *Ohio State Journal on Dispute Resolution Symposium on Dispute Resolution in Special Education* sought to examine current practices in the resolution of special education complaints and due process hearings and brainstorm new ways to serve the needs of the many players in special education, from the parents of children with special needs to the schools providing services to those children. The seven scholars and practitioners on the following panel that began the Symposium—and the audience members whose questions and comments we include—bring perspectives from across the United States. In reflecting on the dispute resolution practices in their particular states, these remarks may provoke more questions than they answer.

With each reauthorization, the Individuals with Disabilities Education Act (IDEA) has provided additional incentives for parents and school districts to engage in dispute resolution in lieu of litigation.[2] The states have responded positively to this encouragement, and many now offer far more options to resolve disputes between parents and schools than what the IDEA requires. Yet as alternatives to the traditional due process hearings proliferate, many advocates see schools becoming more interested in bypassing alternative dispute resolution (ADR) and going straight to the administrative "due process" hearing also set out in the IDEA.[3] But as this panel discussion shows, even something as fundamental to the IDEA dispute

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[1] *Children 3 to 21 years old served under Individuals with Disabilities Education Act (IDEA), Part B, by type of disability: Selected years, 1976–77 through 2011–12* Nat'l Center for Educ. Statistics (April 2013), http://nces.ed.gov/programs/digest/d13/tables/dt13_204.30.asp.

[2] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et. al. (2012). People in the field rarely use the word "idea" when talking about this statute, but instead spell out the acronym.

[3] 20 U.S.C. § 1415, 34 C.F.R. 300.1 (2006).

resolution process as a due process hearing varies tremendously from state to state.

Many who are reading this transcript will have experience with students with disabilities, as someone who works with students and their families (a teacher, administrator, therapist, attorney or advocate), as a parent or family member of a child with a disability, or perhaps as an individual with a disability. For those who have not yet filed or responded to a complaint under the IDEA, a brief introduction to the IDEA itself may be helpful background.[4]

As part of the Civil Rights Movement, parents of students with disabilities (many of whom were African-American) began to bring federal lawsuits seeking to have their local public schools provide services for their children rather than exclude or segregate them.[5] In 1975, Congress passed the Education for All Handicapped Children Act, which required public schools to provide a Free Appropriate Public Education (FAPE) for all students with disabilities.[6] This statute has been amended a number of times since then, being renamed the Individuals with Disabilities Education Act in 1990 to align its terminology with the Americans with Disabilities Act, also passed in 1990.[7] The IDEA requires schools to provide services to students with disabilities, but it leaves much of the implementation of the statute not only to federal regulation but to state law and regulation. Schools must keep parents involved during the process of identifying students for special education and must give parents the option to consent to or refuse services.[8] Schools must also give parents a Procedural Safeguards Notice early on in the special education identification process, which lets parents know what their rights are in special education.[9]

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[4] The IDEA is not the only source of educational services for students with disabilities. Notably, services for students with disabilities are available under Section 504 of The Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; pp. 37–40 of transcript. States also have their own statutes and regulations relating to special education.

[5] *See e.g. Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 282 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

[6] 20 U.S.C. § 1401(9).

[7] Education of the Handicapped Act Amendments of 1961 Pub. L. No. 101–476, 104 Stat. 1103.

[8] This process is called Child Find. 20 U.S.C. § 1415(b)(1).

[9] 34 C.F.R. § 300.504. A school must provide parents a copy once a school year, when a student is initially referred to or the parent requests evaluation for special education, the first time a state complaint or due process complaint is filed in a school year, when a student is disciplined by removal from the school, and at parents' request.

There are several avenues for addressing complaints about special education under the IDEA. There is the due process complaint, which leads to an administrative due process hearing.[10] There is the written state complaint, typically through the state's Department of Education, in which a state investigator looks into the allegations and issues a written determination.[11] Parents can also file a complaint with the United States Department of Education, under § 504 of the Rehabilitation Act of 1973, arguing that their child has faced discrimination because of a disability.[12]

These processes differ in who can initiate them and what kind of relief they can provide. Only parents or public agencies can file due process complaints, and then only to seek relief for a specific student regarding identification, evaluation, placement, or provision of FAPE under the IDEA.[13] Anybody can file a complaint with the state's education agency alleging that a public agency has violated special education laws, but these complaints must involve matters that can be resolved without assessing the credibility of witnesses.[14] A state complaint and a due process complaint can be filed concurrently, but state investigators set aside any issue that is subject to the due process complaint and any due process decision is binding on that issue.[15]

The 1997 IDEA amendments required states to offer mediation for IDEA-related disputes whether or not a due process complaint has been

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[10] 20 U.S.C. § 1415. Schools can also file due process complaints. For example, a school may file a due process complaint if it would like to classify a student as having a disability and parents are refusing to consent to this classification.

[11] 34 C.F.R. §§ 300.151–300.153; § 300.220(c)(3). The determination may order a school to provide appropriate services or change policies and procedures. § 300.151(b)(2). U.S. Department of Education, Office of Special Education Programs (OSEP) regulations leave it to the states whether or not a state's written determination can be appealed. *See* Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565, 569 (2008).

[12] The primary agency responsible for enforcing the IDEA at the federal level is the Department of Education, Office of Rights, Special Education Programs. The Department of Justice, Civil Rights Division, Educational Opportunities Section may become involved by intervening in pending lawsuits or if referred by other federal agencies. *Types of Educational Opportunities Discrimination*, U.S. DEP'T OF JUST. http://www.justice.gov/crt/about/edu/types.php.

[13] 34 C.F.R. § 300.507(a) (2013).

[14] 34 C.F.R. § 300.151(b)(2) (2013); *id* § 300.153. *See, e.g.*, Monica Costello, Note, *Systemic Compliance Complaints: Making IDEA's Enforcement Provisions a Reality*, 41 U. MICH. J.L. REFORM 507, 511 (2008).

[15] § 300.152(c)(1).

filed.[16] Mediations must take place within thirty days of filing a due process claim.[17] The 2004 amendments added a resolution meeting that must occur, or be waived by parents and schools, prior to the due process hearing.[18] Once a due process complaint is filed, schools and parents are required to hold a resolution meeting within 15 days of filing that includes members of the IEP team with specific knowledge of the complaint.[19] If parents do not bring an attorney to the resolution session, then schools cannot bring their attorneys.[20] Parties also have three business days in which they can void any agreement reached at the resolution meeting.[21] Some states encourage the use of third-party facilitators at these resolution sessions.[22]

Parties' preferences for these options, and any other options offered from state to state, differ. The panelists below discuss some of these variations. In some states, parties still seem to prefer to go straight to the due process hearing. Professor Canty-Barnes, for example, speculates that the ability to void resolution meeting agreements may be one reason why such meetings are rarely held in New Jersey.[23] Professor Weber says that mediation is more popular in Illinois than the resolution meetings.[24] Professor Dinerstein notes ADR efforts are rarely effective at all in Washington D.C.[25] These differences in preference and practice inspired this Symposium and deserve further exploration and research.

Only after the IDEA-mandated dispute resolution options have been exhausted, or waived, can a due process complaint go to a hearing officer for decision, and only after that may the parent take the dispute to court.[26] The details of the due process hearings themselves differ more than might be

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[16] Individuals with Disabilities Education Act, Pub. L. No. 105-17, 111 Stat. 37 (1997). 20 U.S.C. § 1415(e) (2012).

[17] 20 U.S.C. § 1415(f)(1)(B)(ii) (2012). In practice, this time period may be extended or pushed back by parties.

[18] 20 U.S.C. § 1415(f)(1)(B) (2012).

[19] 34 C.F.R. 300.510(a)(1) (2013).

[20] 20 U.S.C. § 1415(f)(1)(B)(i)(III) (2012).

[21] *Id.* § 1415(f)(1)(B)(iv).

[22] *See, e.g.*, TIMOTHY HEDEEN ET AL., CADRE, INDIVIDUALIZED EDUCATION PROGRAM (IEP)/INDIVIDUALS FAMILY SERVICE PLAN (IFSP) FACILITATION: PRACTICAL INSIGHTS AND PROGRAMMATIC CONSIDERATIONS (2013).

[23] *See infra* p. 9 of this transcript.

[24] *See infra* p. 27 of transcript.

[25] *See infra* p. 14 of transcript.

[26] 20 U.S.C. § 1415(e)(2)(A)(ii) (Stating that dispute resolution procedures cannot be used to delay a parent's right to a due process hearing).

expected from state to state. Some states have one-tier systems, where a due process complaint is only adjudicated by a hearing officer, while others have a two-tier system, where there is an additional level of review by a second officer before the claim can be brought in court.[27] Some states have administrative law judges conduct due process hearings,[28] some have agencies that conduct dispute resolution procedures,[29] while in others the hearing officers are appointed by the state Department of Education. In Massachusetts, for example, the hearing officers are union employees and typically hear only special education matters.[30]

Jurisdictions also vary widely in how due process hearings are conducted. In some states, the burden of proof falls on the party bringing the claim,[31] while in others it falls on the party defending it.[32] The panelists vary on what difference, if any, they think this makes. States' procedures for due process hearings also vary widely. Illinois, for example, allows lawyers to make motions—such as a motion for summary judgment[33]—while in Ohio, whether or not you can file a motion depends on the hearing officer.[34] Professor Colker cautions that while decisions by professional, full-time administrative law judges may be easier to read than those by part-time, non-ALJ hearing officers, they do not necessarily reflect better outcomes for parents in due process hearings.[35] Also, as Professor Rivkin notes, in Tennessee prevailing parties still face obstacles in obtaining ordered relief.[36]

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[27] *Id. §* 1415(g); 34 C.F.R. § 300.514 (2013). For an overview of how hearing officers are utilized throughout the country, see Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 3 & n.7 (2011).

[28] *See infra* p. 11 of transcript (California), p. 18 of transcript (Massachusetts), p. 8 of transcript (New Jersey), and p.21 of transcript (Tennessee).

[29] *See infra* p. 25 of transcript (Pennsylvania).

[30] *See* Ohio Department of Education, *Complaint and Due Process Databases*, http://education.ohio.gov/Topics/Special-Education/Mediation-Complaints-and-Due-Process/Complaint-and-Due-Process-Databases.

[31] Special Education Symposium, *supra* note 28, at 11 (statement of Professor Ruth Colker).

[32] *Id.*

[33] Special Education Symposium, *supra* note 28, at 22 (statement of Professor Mark Weber).

[34] Special Education Symposium, *supra* note 28, at 31 (statement of Professor Ruth Colker).

[35] *Id.* at 30–32.

[36] Special Education Symposium, *supra* note 28, at 23 (statement of Professor Dean Hill Rivkin).

One useful tip he provides on the enforcement front is to "mine your state's Administrative Procedure Act," explaining he was once able to use Tennessee's Act to get an injunction to force a school to comply with a due process judgment.[37]

Many states and individual school districts have developed other forms of dispute resolution beyond those required by the IDEA. These procedures, which often focus on the pre-due-process complaint filing time period, are commonly called "upstream" solutions.[38] Pennsylvania, for example, has an "evaluative conciliation" process in which parties meet with a consultant who assesses the strengths and weaknesses of their case and facilitates settlement discussions.[39] Since 1998, the federal government has funded the Center for Appropriate Dispute Resolution in Special Education (CADRE) to serve as a national-level clearinghouse and think tank for programs that encourage the use of collaborative dispute resolution processes.[40] Readers who want more information about special education dispute resolution in their state would be well-served starting their resource search at CADRE's website, which emphasizes the use of upstream procedures in special education.

Another element of the dispute resolution process worth considering is the availability of counsel. Some lawyers in Illinois describe doing special education cases at a loss.[41] In D.C., there is a robust bar of attorneys representing parents in special education complaints, but agreeing to take less

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[37] *Id.* at 38.

[38] Special Education Symposium, *supra* note 28, at 41 (statement of Professor Erin Archerd). The Center for Appropriate Dispute Resolution in Special Education (CADRE)—a center funded by OSEP—has created a continuum model in which it arranges interventions from prevention (e.g., parent engagement) to legal review (e.g., litigation). *See CADRE Continuum of Dispute Resolution Processes & Practices*, CADRE http://www.directionservice.org/cadre/continuumnav.cfm (last visited Dec. 18, 2013) (explaining processes such as parent-to-parent assistance and use of an ombudsperson).

[39] *Evaluative Conciliation Conference (ECC)*, THE OFFICE FOR DISPUTE RESOLUTION, http://odr-pa.org/alternative-dispute-resolution/evaluative-conciliation-conference/ (last visited date); *See also* Special Education Symposium, *supra* note 31, at 34 (statement of Cathy Skidmore) (noting that Massachusetts, like Pennsylvania, offers an evaluative conciliation process).

[40] CADRE BROCHURE, THE NATIONAL CENTER ON DISPUTE RESOLUTION IN SPECIAL EDUCATION, *available at* http://www.directionservice.org/cadre/cadrebrochure.cfm.

[41] Special Education Symposium, *supra* note 28, at 27 (statement of Professor Mark Weber).

than their statutory fees is common in negotiated settlements with schools.[42] In Tennessee, there are too few lawyers willing to take on special education cases for the chance of statutory fees.[43] Pennsylvania, by contrast, has both a robust parents' counsel bar and well-developed dispute resolution office.[44] These are very different scenarios, yet a lawyer could drive from Philadelphia, to Washington D.C., to Knoxville in a day.

Even with all of the options out there, one key structural hurdle may be the hardest to overcome. Children's special educational needs are evaluated every year, and a settlement reached this year may have to be reworked the next. In a world of stressed-out parents and overtaxed schools, the short-term, partial victory may be all there is, and exhaustion may overwhelm the willingness of all parties to look for longer-term or more-encompassing solutions.

In the end, we are left to ponder these questions from the audience. As Professor Eloise Pasachoff asks of the panel, "What is the value of having all these different dispute resolution systems?"[45] Or, as another audience member put it, "How come this is not uniform? Some of these things just need to be uniform."[46] May this panel discussion and the associated Symposium be the beginning of a larger conversation about how we design our special education dispute resolution systems.

II. PANEL DISCUSSION TRANSCRIPT

Ruth Colker[47]: Thank you everyone for coming. I wanted to thank the sponsors of this event. We were generously sponsored by *The Ohio State Journal on Dispute Resolution*. They have done the bulk of the work. We also received funding from the Center on Interdisciplinary Law and Policy Studies at the law school and really appreciate their funding so we could have a great discussion here today. We also have had support from the ADA

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[42] Special Education Symposium, *supra* note 28, at 14 (statement of Professor Robert Dinerstein).

[43] Special Education Symposium, *supra* note 28, at 21 (statement of Professor Dean Hill Rivkin).

[44] Special Education Symposium, *supra* note 28, at 25 (statement of Professor Cathy Skidmore).

[45] Special Education Symposium, *supra* note 28, at 38 (statement of Professor Eloise Pasachoff).

[46] *Id* at 51.

[47] Distinguished University Professor and Heck-Faust Memorial Chair in Constitutional Law, Moritz College of Law, The Ohio State University.

coordinator's office. Scott Lissner, the University's ADA Coordinator is here. I wanted to thank him for his help. Because of his support, we have real-time captioning today. So behind me, you see that our words are being written for people who have hearing impairments so they can fully participate today. So we appreciate those efforts. I wanted to thank the faculty members who helped me make this event possible. Erin Archerd[48] has been a great co-collaborator on this. It's nice when you have someone you can totally count on to make all the pieces come together in the puzzle. I have three of my colleagues moderating, in addition to Erin.

Tomorrow, Ellen Deason[49] and Sarah Cole[50], and my retired colleague Nancy Rogers[51] will be moderating. I appreciate the time it takes for them to make that possible. I especially thank all of you who came in from out of town. Some of you are speaking today and some tomorrow. This is an exciting event, and I look forward to the conversations we will have, as well as the lectures.

Today's session will be very different than tomorrow's in that today's real-time captioning is going to be transcribed.

Thank you so much for being here today.

Erin Archerd: Rather than spending time saying what state everybody is from, I think that we are going to start by letting each of our speakers tell you a little bit about what special education dispute resolution looks like in each state. There is a wide range of states here. We have: California, Washington, D.C., Illinois, Massachusetts, New Jersey, Ohio, Pennsylvania, and Tennessee.

They will introduce themselves, tell you a little bit about their state, and then once they do that, we will open it up for questions from me as the moderator, and I am sure you have a lot of questions to ask as well. Why don't we start with you, Esther Canty-Barnes.[52] Can you tell us a little bit about what happens in New Jersey?

Esther Canty-Barnes: Lately, New Jersey has been a very hot jurisdiction for a number of reasons. Let me paint a picture for you. Although

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[49] Joanne Wharton Murphy/Classes of 1965 and 1973 Professor in Law, Moritz College of Law, The Ohio State University.

[50] John W. Bricker Professor of Law; Director, Program on Dispute Resolution, Moritz College of Law, The Ohio State University.

[51] Professor Emeritus of Law, Moritz College of Law, The Ohio State University.

[52] Clinical Professor of Law and Director of the Education and Health Law Clinic, Rutgers School of Law, Newark, New Jersey.

we are a small state in terms of area, we have approximately 2.8 million people, and over 600 school districts.[53] Every school district is represented by legal counsel, whether it's for mediation or due process.

In New Jersey, many school districts utilize litigation insurance. This protects school districts from becoming overly extended in terms of the amount of attorneys' fees and costs they pay. Those school districts that utilize this method refer the matter to their insurance carrier, and the carrier picks up the tab for that particular litigation and legal counsel is appointed. Overall, the special education process is overseen by the New Jersey Department of Education, Office of Special Education programs. (OSEP)[54]

OSEP is responsible not only for monitoring compliance in terms of IDEA, but this is the starting point from which mediation, due process and complaint investigations originate. OSEP ensures that it documents the numbers of cases that are coming into the system and keeps tabs of the data that it reports to the U.S. Department of Education.[55]

New Jersey is a small state, but we have over 200,000 children who are classified. That's about 15.7 or 15.8 percent of the population of public school children in New Jersey who are receiving special education related services.[56]

Mediation is a voluntary process. We have about five mediators, and there are also five complaint investigators. These mediators are responsible for handling all IDEA-related cases that come through the Department of Education for mediation.

When mediations are held, they are required under New Jersey regulations to be scheduled within 15 days and completed by 30 days.[57] Most of the time, this does not happen.

New Jersey also has a policy or procedure that if the mediation does not work, the parents may request that the mediation be converted to due process. When this occurs, the timelines start anew and the parent has to go through the entire process again. That is, there must be a 15-day resolution or a mediation in lieu of the resolution period, and the 30-day wait period of

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[53] New Jersey Department of Education Websites lists 694 School Districts – http://edcuation.state.nj.us/directory/ (last visited October 21, 2014).

[54] N.J.A.C. § 6A: 14-2.6(d)(Mediation); N.J.A.C. § 6A:14-2.7(c)(Due Process).

[55] New Jersey Department of Education Office of Special Education, Part B State Performance Plan: 2005–2012, http://www.state.nj.us/education/specialed/info/spp/spp.pdf

[56] *New Jersey Department of Education Office of Special Education Programs 2013 Special Education Data*, STATE OF NEW JERSEY DEPARTMENT OF EDUCATION, http://www.state.nj.us/education/specialed/data/2013.htm.

[57] N.J.A.C. § 6A: 14-2.6(d)(3).

time before the case is transmitted to the Office of Administrative Law (OAL). If mediation fails, and the matter is transmitted for a hearing, a different agency is responsible for conducting the hearing.

The Office of Special Education Programs then transfers or transmits the case to the Office of Administrative Law. The Office of Administrative Law is the State agency that is responsible for handling the due process hearings. This agency was established in 1979 for the purpose of hearing all contested cases that were transmitted from administrative agencies and provided for the appointment of administrative judges to hear these cases. They have the authority to hear contested cases that are transmitted from designated administrative agencies within the State, including Special Education matters transmitted from the New Jersey Office of Special Education Programs. Judges who are appointed not only hear contested Special Education cases but cases from over 50 other agencies. Thus, Due Process hearings in New Jersey are administrative hearings conducted by administrative law judges.[58] This process is a very formal one. Where due process petitions are filed, New Jersey's administrative code provides that a school district must hold a resolution meeting "within 15 days of receipt of a written request,"[59] . . . hold a mediation in lieu of a resolution within 30 days,[60] or waive the resolution meeting. Resolution meetings are legally binding and enforceable agreements[61] but can be voided within three days.[62] Maybe this is the reason why resolution meetings are rarely held. During the 2011-12 fiscal year, 17 resolution meeting agreements out of 20 resolution meetings were held.[63]

In terms of compliance with the provision of IDEA and the timelines required, New Jersey is out of compliance. There is basically consensus between all parties that this is a problem. More recently, interestingly enough, the Presiding Judge and Acting Director of the Office of Administrative Law and other judges hearing IDEA cases, met with members of the Education Law Section of the New Jersey State Bar Association in an effort to obtain feedback regarding its proposal to change the manner in which Special Education Due Process cases are handled in New Jersey. In a White Paper dated February 18, 2014, the OAL indicated that the problem is far more serious than anticipated. It indicated that there were several reasons for considering the changes in the manner in which these cases are to be

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[58] N.J.A.C. § 6A: 14-2.7(a).

[59] N.J.A.C. § 6A: 14-2.7(h)(2).

[60] N.J.A.C. § 6A: 14-2.7(h)(4).

[61] N.J.A.C. § 6A: 14-2.7 (h)(6)(ii)&(iii).

[62] N.J.A.C. § 6A: 14-2.7(h)(6)(ii).

[63] http://www.state.nj.us/education/specialed/info/spp/spp.pdf.

handled including competing cases from other agencies and the lack of judges to handle these matters. The paper indicated that in 2012 - 16,195 filings plus 580 Special Education cases were on the docket; and in 2013 - 17,228 filings plus 803 Special Education cases were on the docket. Due to the increase in filings and the lack of judges to hear these cases, the OAL is proposing to 1) limit the number of days for hearings to 1.5 days per party, except for good cause (this includes cross examination); 2) limit issues to those pled in the petition; 3) limit direct examination of witnesses; 4) limit the number of witnesses and 5) limit written summations to be submitted to 20 pages without any exhibits or attachments.

Currently, New Jersey has a very formal process of handling mediation and due process complaints. No one side is entirely content with the manner in which these cases are processed. The extended delays in getting these matters heard affects the very vulnerable who the Act sought to protect, and New Jersey is looking to make changes in the way its process is being implemented. One way to do this is to work collaboratively to obtain input from all sides. This is a start of a very long and arduous process.

Erin Archerd: So Ruth is here in double capacity, both on behalf of the state of Ohio, but also to speak about California as well. So Ruth, I will let you start with California, which will be a little bit more of an unknown state to some. And then if you want to add a little bit about Ohio as well.

Ruth Colker: I wasn't going to speak about California today because I don't practice law there. Julie Waterstone[64] was going to do that. She couldn't make it because her husband had to have back surgery.

I have been to California three times to speak about special education matters, so I have some knowledge of California. Always happy to have to go to California. It's a tough gig.

So I wanted to tell you a little bit about what I learned about California through my travel and research there.[65] It's interesting to me because it's really quite different from the way we handle these matters in Ohio.

It's interesting to see contrasting ways of resolving special education issues. California has administrative law judges (ALJ) that work full time for the state of California who hear the cases when it goes to due process.

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[64] Director of the Children's Rights Clinic and Clinical Professor of Law, Southwestern Law School.

[65] For further discussion about special education due process decisions in California, see RUTH COLKER, DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 183–205 (2013); *California Hearing Officer Decisions*, 32 J. Nat'l Ass'n. Admin. Law Judiciary 461 (2012); *California Year in Review: 2013 Special Education ALJ Decisions*, 34 J. Nat'l Ass'n Admin. L. Judiciary 47 (2014).

The judges also serve as mediators. I don't know if other states do that. They are wearing two hats. Some people think that's positive because it gives them an opportunity to really see results out in the field, get a sense of the real world experiences of people attending meetings within a school district. Others feel it's a conflict of interest.

But there is a concern that maybe there is office talk, you hear about mediations in a case for which you might later be an ALJ, which we all know needs to be confidential. There are mixed reviews on whether that's a good or bad process.

It's different than what we have in Ohio. When I read the ALJ opinions in California, I am impressed with their professionalism. They are very well written and have been proofread for typos and grammatical errors. They are all in the same format. They say which party prevails in the issue so you can skim the cases if you want to or read them more closely, if you care to do that. They do a standard court opinion. That, I think, is certainly a positive development and reflects professionalism.

California has a database where you can help litigants find relevant comparative cases in the state.[66] Despite all that, which I see as a positive element, I think it's fair to say the plaintiff bar, which represents students, is very unhappy with California. I will share with you the complaints I hear from the plaintiff bar.

Students do not prevail very frequently in California. They have fairly low success rates compared to other states I studied. In 2013, for example, of the 74 cases I was able to read that takes us through the middle of December, students prevailed in 14.9 percent of the cases. That's a pretty low success rate. Districts prevailed in 52 percent of the cases. The remaining cases were split decisions.

As in New Jersey, every school district is represented with counsel in every one of the cases. One issue I was curious about is how does burden of proof impact these decisions? In New Jersey, the school district has the burden of proof in most cases. In other states, like California, the school district only has the burden of proof when they initiate a case, such as when they want to test a child for a disability over the parent's objection.

What I found was that burden of proof didn't matter. School districts were just as likely to win irrespective of whether they had the burden of proof. That's interesting to me. I haven't been able to demonstrate that burden of proof changes the results.

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[66] See http://www.dgs.ca.gov/oah/SpecialEducation/searchDO.aspx (last viewed on March 18, 2014).

In terms of outcomes in California, what I found in my own research and reading 74 decisions in 2013 and talking to lawyers, the relief that the ALJ's order in California can only be described as stingy.

The cases in which students prevail don't feel like a victory because they reflect limited relief. In one case, a student, a 5-year-old, had been denied 46 days of education, and the relief was 46 hours of compensatory hours of services.[67]

In another case, there was a delay of six months in finding the student was disabled.[68] The ALJ ruled that the student should have been classified after he attempted to commit suicide. Obviously, he was then having health issues. But putting that aside, the ALJ ordered that for the six-month delay in evaluating him as disabled, he gets six hours of counseling.

In another case, a student was 15 years old. His placement was entirely inappropriate. The teacher was not qualified to teach that student. The student never should have been placed in that classroom. No education at all, no compensatory education was ordered.

A school district insisted on graduating another young man who was 19 with a diploma[69] although it was clear he should not have been on the diploma track. The ALJ ordered some brief transition services but offered no compensatory education even though he was a 19-year-old who was entitled to be educated until his 22nd birthday.

There are other cases in California where the ALJ was dismissive to the parents and the claims, especially when the parents didn't speak English. The ALJ said the parent was confusing, and that the ALJ was not going to give much weight to the parent's testimony when the parent was speaking through a translator.[70] In one case, the translator was translating from English to

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[67] *See* Parents *ex rel.* Student v. Hollister Sch. Dist., No. 2012080366 (OAH Cal. Jan. 16, 2013) (Taira, ALJ), *available at* http://heekim.com/decisions/2012080366.pdf (last visited Feb. 25, 2014).

[68] *See* Parents *ex rel.* Student v. Anaheim Union High Sch. Dist., No. 2012031076, 4 (OAH Cal. May 9, 2012) (Lepkowsky, ALJ), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2012031076.pdf (last visited Feb. 25, 2014).

[69] *See* Parent *ex rel.* Student v. L.A. Unified Sch. Dist., No. 2013050219 (OAH Cal. Aug. 16, 2013) (Hohensee, ALJ), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2013050219.pdf (last visited Feb. 25, 2014).

[70] *See* Parent *ex rel.* Student v. New Haven Unified Sch. Dist., No. 2013010236 (OAH Cal. July 24, 2013) (Ravandi, ALJ), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2013010236.pdf (last visited Feb. 16, 2014).

Spanish, but the parent's native language was a Mexican dialect which was not the same language used by the Interpreter.[71]

There was a discussion a few weeks ago among the special education bar in California, asking why these results are so stingy. I don't think anyone really knows the answer. Because the ALJs work for the state of California, do they feel like they have the responsibility of marshaling resources and being stingy with the tax dollars? I don't know. That was an argument that was made.

I find California to be an odd state in that on the one hand, when I look at structurally how it's created, they have rules that are followed with hearings that are orderly. Further, they render timely decisions. But then is justice being achieved? It's hard for me, reading these cases, to conclude that justice is being achieved because of the low rate of success by students and the stingy relief that is ordered.

That's my sunny hat from California. You now want me to the put on my Ohio hat?

Erin Archerd: Let's come back to Ohio. Bob, you are going to speak a little bit about D.C.

Robert Dinerstein[72]: D.C., a state that's not a state. You know the expression, "If it ain't broke, don't fix it."? D.C. is broke. They tried to fix it, and it's still broke. D.C. is a very unusual jurisdiction with regard to special education in a number of ways.

Per capita, D.C. is by far the most litigious jurisdiction in the Special Ed. world. It's a jurisdiction where most parents do have legal representation.[73] That representation comes from a mix of sources: some private law firms, high-volume special education practices of varying quality, some nonprofits. There are thus a variety of folks who do these cases. Based on my own experience, interviews with lawyers and court officials and an inquiry on a special education listserv, the general concern is that, with respect to ADR, it isn't happening in D.C. in a way that's effective. Only very occasionally is ADR effective in D.C.

Here are just a couple of reasons about why that might be the case. I think the principal concern that parents' attorneys have expressed, confirmed

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[71] *See* Parents *ex rel.* Student v. L.A. Unified Sch. Dist., No. 2012090211 (OAH Cal. May 16, 2013) (Cohn, ALJ), *available at* http://www.documents.dgs.ca.gov/oah/seho_decisions/2012090211%202013010694.pdf (last visited Feb. 16, 2014).

[72] Professor of Law & Associate Dean for Experiential Education, American University, Washington College of Law, Washington, D.C.

[73] *See* RUTH COLKER, DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES ACT 207–15 (2013).

by others who have looked at the issue, is that the personnel from the school system, who participate in mediation or resolution sessions, do not come to the sessions prepared to negotiate. They more or less say, "Here is what we will offer," and that's that. You either take it or leave it. They do not participate in a negotiation in a true sense. They often do not have authority to re-consider or adjust their position; if the parent's attorney makes a counter-offer the LEA representatives simply stick to what they were told to offer. Moreover, even when they sometimes agree to resolve the merits of the dispute, they will either not make an offer to pay attorney's fees or will make a low-ball offer. For attorneys representing low- and middle-income parents, attorneys' fees are critical to continued representation and to sustaining a legal practice. There is evidence that many of the firms that handle a large volume of special education cases are facing severe financial problems because of the difficulty of obtaining fees in a timely fashion.

It's a difficult conflict of interest situation for the lawyer because if the client is receiving all or most of the relief he or she wants at the expense of the attorney not being paid, the lawyers may feel bound to recommend that the client accept the offer (or the client may decide to do so on his or her own), even though it makes representation of other clients (or the same client in the future) much more difficult. It's a troubling situation.

To be sure, there have been some successful mediations along the lines of what Ruth was saying. The former chief hearing officer for the student hearing office, with whom I spoke, conducted some successful mediations (according to others as well as him). The one problem he identified was that he could not really get the parties in these mediations to think about at least narrowing the issues in dispute (that would need to be litigated) even if issues could not be resolved completely.

There is a suspicion on the part of parents' attorneys that District of Columbia Public School system (DCPS) requests resolution sessions as a way of buying more time in the due process hearing process. When it's clear that the case will not be resolved, DCPS always requests the maximum amount of time allowed for the resolution period and will never agree to a shortened time period after a mediation session fails.

In D.C., the special education system has been under a consent decree since 2006.[74] Actually, the decree consolidated two class actions. In one, *Blackman*, plaintiffs claimed that due process hearings were not held in a timely manner; in the other, *Jones*, plaintiffs claimed that Hearing Officer Decisions and Settlement Agreements were not implemented adequately. The

[74] Blackman v. District of Columbia, Civ. Action Nos. 97-1629-PLF and 97-2402-PLF (DDC, August 24, 2006) (entry of consent decree)).

Blackman case has now been closed. The *Jones* case, on the failure to implement adequately hearing officer decisions, remains open. The District of Columbia is on the threshold of meeting the *Jones* benchmarks as well.[75] According to the Court Monitor's recent report, one of the ways the District is trying to get out from under the yoke of some of the time-lines in the case is to put more and more burden on the parents. For example, DCPS may say to the parent, "OK, you can get an independent evaluation; you need to find the evaluator." Or, "OK, parent, you are entitled to compensatory education, now you need to research possibilities and find out what you want." If the evaluations or identification of compensatory education do not occur in a timely way, the District says, "We are not the ones responsible."

There is a pretty deep distrust on the part of the parents' attorneys on the one hand and the school officials and attorneys on the other. When I founded the law school's Disability Rights Law Clinic ten years ago, I tried to determine how and why this distrust happened. It is like walking in at the end of a fight or argument: you can't tell who started it, but what you can tell is that the situation is problematic and very dysfunctional. There have been efforts over the years to try to assess this dysfunction and suggest ways to overcome it and address the other problems that we have.[76] One possibility, of course, is to invoke more robust ADR techniques in the process. But this approach has not really taken hold in the District.

I could give you more statistics about the number of complaints filed and the number of hearings held. What I cannot tell you is whether the system is meeting the special educational needs of children with disabilities and their families.

Erin Archerd: We may return to that especially if anybody wants to hear more statistics. Later we can talk in terms of parents prevailing, D.C. has higher rates than any other jurisdiction. Do you want to talk about that now?

Robert Dinerstein: No. It's interesting, in our own cases, we have had some success. Sometimes we have lost the battle—the due process hearing—but won the war—for special education and related services. That is, we had a recent hearing where we failed to persuade the Hearing Officer that the

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[75] CLARENCE J. SUNDRAM, COURT MONITOR, REPORT OF THE MONITOR FOR THE 2012–13 SCHOOL YEAR, BLACKMAN V. DISTRICT OF COLUMBIA 65 (DDC, filed February 3, 2014). ("It is clear from this year-end review that although the District has not yet achieved compliance with the specific measures in the Blackman Jones Consent Decree, it stands at the threshold of doing so.").

[76] *See, e.g.*, D.C. APPLESEED CENTER FOR LAW AND JUSTICE & PIPER RUDNICK LLP, *A TIME FOR ACTION: THE NEED TO REPAIR THE SYSTEM FOR RESOLVING SPECIAL EDUCATION DISPUTES IN THE DISTRICT OF COLUMBIA* (2003).

DCPS placement was inadequate. But it was clear to all concerned that the local school would not be able to provide all of the different services that the student needed, and so my colleague called up the head of the special education agency and said, "Here are all the things the school has to do (per the Hearing Officer's Decision), do you really think the school can provide them?" The official agreed with us and DCPS agreed to the student's placement in a non-public school.

Parents do win a lot. But I do think you have to drill down a little bit to see the kinds of cases in which parents prevail.

A lot of times, attorneys file due process complaints because of the school's failure to evaluate the student for special education. In those cases, parents prevail quite a lot. That's a pretty straightforward case. Issues of appropriate placement may be a different matter. Placement—especially out-of-school placement to a non-public school—is a big issue in D.C. For parents who are seeking nonpublic placement at public expense, that is a much more complicated case. The change from having the school district bear the burden of persuasion in due process hearings to having the party seeking to appeal the decision of the Multi-Disciplinary Team (usually the parent) bear the burden—a consequence of the Supreme Court decision in *Schaffer v. Weast*[77]—has had a major effect on the due process hearing process in D.C. When I started the clinic, the burden of persuasion was on the school district, and I remember asking advocates "What is your experience with proving liability at due process hearings? Do you always need to have expert witnesses?" I was told that many times DCPS or its attorneys would be unprepared and would not have mustered the documents and other evidence needed to meet their burden. A party with the burden of persuasion cannot count on the other side's lack of preparedness to prevail.

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[77] *Schaffer v.* Weast, 546 U.S. 49 (2005). At this writing (October 23, 2014), legislation pending in the D.C. City Council, the Special Education Student Rights Act of 2014, Bill B20-0723 (part of a package of three proposed bills pending in the City Council that would reform D.C.'s special education system in various ways), would change the burden of persuasion language as follows: "The party who requests a due process hearing shall have the burden of proof; except, that in all cases, the public agency shall have the burden of proving the appropriateness of the current or proposed educational placement for a child with disabilities." Special Education Student Rights Act of 2014, Sec. 3, Procedural safeguards; due process requirements. (7). The bill (and the companion legislation) has had its first reading on October 7, 2014, with the second and final reading pending. The bill and its current status are available at http://lims.dccouncil.us/_layouts/15/uploader/Download.aspx?legislationid=31379&filename=B20-0723-Introduction.pdf (last visited Oct. 23, 2014).

It's tricky. It can be difficult for a parent to prove the negative. For example, if we have a student in a private school and DCPS is seeking to return him to the public school setting, we have to prove that the public school cannot provide a Free Appropriate Public Education ("FAPE"). The school will assert that they can do so. The hearing officer may be disinclined to disbelieve DCPS's claim, unless the reason for not providing FAPE is obvious (e.g., the student needs a kind of service or setting that the school does not provide). The hearing officer does not necessarily see his or her role as imposing substantial obligations on the school district. I think the results of these kinds of cases statistically are less positive than the overall numbers might suggest.

Erin Archerd: Now Mike is going to tell us about Massachusetts.

Michael Gregory[78]: I will start by introducing myself and describing my work so you can understand my perspective on the Massachusetts system.

I teach in the Education Law Clinic at Harvard Law School[79] which is part of a larger collaboration between the law school and a nonprofit child advocacy organization in Boston called Massachusetts Advocates for Children (MAC).[80]

The focus of our collaboration is a project called the Trauma and Learning Policy Initiative (TLPI)[81] and our mission is to ensure that children who have been traumatized by exposure to violence and other adverse childhood experiences[82] succeed in school. Part of our work is providing legal representation in the special education system to families of students who have had traumatic experiences. In these cases, we attempt to discover and articulate the interface between the impacts that a traumatic response may be having on a student's learning, behavior or relationships in school and the disability(ies) that qualify the student as eligible for special education and/or related services under the IDEA.[83]

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[78] Assistant Clinical Professor of Law, Harvard Law School, Cambridge, Massachusetts.

[79] *See* http://www.law.harvard.edu/academics/clinical/clinics/education.html (last visited Apr. 9, 2014).

[80] *See* http://www.massadvocates.org/ (last visited Apr. 9, 2014).

[81] *See* http://traumasensitiveschools.org/ (last visited Apr. 9, 2014).

[82] *See* Vincent J. Felitti et al., *Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245 (1998) (defining the term "adverse childhood experience").

[83] For a discussion of the impacts that exposure to traumatic experiences can have on students' learning, behavior and relationships in school, *see* SUSAN COLE ET AL.,

With that as background, I will now share a little bit about the structure of our special education dispute resolution system in Massachusetts and then provide a few statistics to give you a sense of the size and scope of our system.

I am in the fortunate position of having two colleagues here with me today from Massachusetts. Joining us are Reece Erlichman, who is the director of the Massachusetts Bureau of Special Education Appeals (BSEA) and Alisia St. Florian, an attorney who represents Massachusetts school districts in special education matters. If I say anything wrong or leave anything out, I know they will be sure to jump in.

Massachusetts has a one-tier due process system, and the agency that conducts hearings is the Bureau of Special Education Appeals (BSEA).

The BSEA has jurisdiction over all IDEA and Section 504 matters. While the Bureau is housed within our state's Division of Administrative Law Appeals (DALA), it is designed by statute to be separate from the other components of DALA's work. For example, the independent hearing officers and mediators who work at the Bureau only hear special education matters. In addition, apart from a few exceptions that are listed in the statute, special education matters are not assigned to administrative law judges or magistrates who hear other types of cases at DALA.

The statute that establishes the Bureau explicitly gives it discretion to develop and use alternative dispute resolution mechanisms. Two methods of ADR are named in the statute. One is called the Settlement Conference, which we will be making a presentation about tomorrow and about which the three of us are currently writing an article for this symposium issue.[84]

The second ADR method explicitly mentioned is the advisory opinion process, where a BSEA hearing officer not assigned to hear the case on the merits listens to limited presentations from the parties and renders a non-binding opinion about the likely outcome of the case. There are also a couple other ADR options that exist in our state that are not mentioned in statute. One is called the SpedEx Program, where the parties agree to have the student evaluated by a mutually agreed upon expert chosen from a panel maintained by the Department of Elementary and Secondary Education (DESE); the recommendations of the expert are non-binding but should be implemented within 30 days if both parties agree. There is also the facilitated

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HELPING TRAUMATIZED CHILDREN LEARN (2005), available at http://traumasensitiveschools.org/tlpi-publications/ (last visited Apr. 9, 2014).

[84] *See* Reece Erlichman, Michael Gregory & Alisia St. Florian, *The Settlement Conference as a Form of Dispute Resolution in Special Education*, 29 OHIO ST. J. ON DISP. RESOL. 407 (2014).

IEP process, where the BSEA will make a facilitator available to attend an IEP meeting where the parties believe there is a high likelihood of tension or an inability to communicate effectively.

Of course, we also have our state complaint resolution process, called Program Quality Assurance Services (PQA) and administered by DESE. I have accessed this system a couple of times on behalf of clients but have more familiarity with the due process system. PQA's complaint specialists are assigned to particular school districts and investigate all of the complaints that are filed with respect to that school district. This seems to make sense from the standpoint that one goal of the state complaint system is supposed to be addressing systemic violations within a particular district; it is easier to identify systemic problems when one person is hearing all the complaints coming in. On the other hand, I have had some parents share with me that a specialist's familiarity with the school district has caused them to perceive a bias on the part of the specialist.

A few more details about the Bureau itself: the hearing officers are all full time state employees. The statute requires that they be knowledgeable and experienced attorneys.

Reece Erlichman[85]: With respect to the hearing officers, they are all in the union which makes a big difference in terms of their feeling able to render decisions that they believe are fair and just and not being concerned about whether their jobs are on the line.

Michael Gregory: To make sure everyone could hear Reece's comment, all the hearing officers are members of the collective bargaining unit of state employees. The mediators are also full time employees of the state.

The statute also establishes an advisory council for the Bureau which is personned by a combination of representatives from professional associations—such as the superintendents and the school committees—and an equal number of representatives from the advocacy organizations—such as the Federation for Children with Special Needs and Massachusetts Advocates for Children.

In addition to the requirements of the statute, there is another important feature of our system which is that the written rulings of the hearing officers are both posted online by the Bureau and reported in the Massachusetts Special Education Report (MSER).[86] As a practitioner, this is a wonderful resource. The decisions are not only available, but indexed according to

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[85] Director, Massachusetts Bureau of Special Education Appeals, Boston, Massachusetts.

[86] *See* http://www.landlaw.com/ma-special-education-reporter.asp (last visited Apr. 9, 2014).

subject matter. It makes for a very coherent body of local case law, because the decisions are so well reported.

Generally, that is a brief summary of the structure of our dispute resolution system in Massachusetts. Now, I will share a few of the relevant statistics. There may be more recent data available. The last time I looked, the data was current as of 2012. These statistics are available on the BSEA website;[87] I have calculated the percentages. In 2012, there were just under 164,000 students in Massachusetts who were on IEPs; of those, about 8,500 IEPs were rejected. That means roughly 5 percent of IEPs in the state were rejected. In that year, there were 917 mediations, which is about 11 percent of the total number of rejected IEP's, but only about 6 percent of the total number of IEPs. Hearing requests that year numbered 582, which would be 7 percent of the total number of rejected IEPs and only 0.4 percent of the total number of IEPs. In terms of actual hearings—meaning cases that were filed and went all the way through to a final decision—there were 52 in 2012 which is 9 percent of the hearing requests filed, but only 0.6 percent of the rejected IEPs.

I think these figures are useful because many people tend to think of special education as this highly litigious process and yet a substantial number of IEPs are not even rejected by parents, much less litigated. It is important to keep this in mind.

To tell you a bit about the outcomes of hearings that year—and I will only mention the statistics from 2012, though they are largely consistent over the past ten years—in the 52 hearings held in 2012, parents fully prevailed in 13 decisions, or 25 percent of the time. The school district fully prevailed in 26 decisions, or 50 percent of the time. There was mixed relief in the remaining portion.

Audience Question: What is the break down by prevailing party based on representation?

Michael Gregory: I do have those figures before me. When parents fully prevailed—13 decisions—they were represented by counsel in 7 cases. They were represented by lay advocates in two cases. And, actually, four parents fully prevailed who appeared *pro se*. The school district was represented by counsel in all cases.

Where the district fully prevailed—26 decisions—the parents were represented by council in 8 cases. The parents had lay advocates in 4 cases, and the parents appeared pro se in 14 cases. Again the district was represented by counsel in all cases.

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[87] *See* http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/ (last visited Apr. 9, 2014).

Despite the conclusions you may draw from those figures, I think I can speak for both parents' attorneys and school districts' attorneys when I say—and Alisia, tell me if I'm wrong—that I think the BSEA is an institution that is highly respected by both sides of the bar as being neutral, and as having hearing officers who understand the nuances and complex issues that arise in these cases.

I am completing my 10th year of practicing special education in Massachusetts, and I believe all the hearing officers who are currently practicing have been there longer than I have been doing this. These are professionals with a lot of experience. While the statistics may seem lopsided in favor of school districts, these are only the cases that proceed all the way to hearing—these statistics do not account for the many cases filed at the Bureau where parents are able to obtain satisfactory relief through a settlement agreement. The major concern is for parents who do not have legal representation and are unable to access the Bureau. For parents who can, many find it to be a very fair, though arduous and expensive, process and the BSEA is an institution that we are proud of in Massachusetts. The big question we are left with is—what happens to the high percentage of students with rejected IEPs whose cases are never brought to the Bureau? How can we make sure these families have access to meaningful opportunities to resolve their special education disputes?

Erin Archerd: I feel like we are starting to hear some interesting patterns but also some contrasts between the jurisdictions here. Now, Dean is going to tell about Tennessee.

Dean Hill Rivkin[88]: Thank you. In 2008, I served as a visiting professor in Bob Dinerstein's disability clinic at American University Washington College of Law. If you think the grass is always greener, it's not. At American, we were handling special education cases in D.C. in which numerous parents had prevailed in due process hearings and had been ordered certain relief—compensatory services but never received these services. It was a year or two later when we were looking at these cases, and they hadn't received any of the relief that they had been awarded.

Tennessee is very much at the opposite end of the spectrum, as you will see in a minute with the statistics that I am going to tell you. But I'm not sure it's a whole lot better for reasons that I'll explain.

To prepare for this session, I canvassed a former student of mine who just retired as the head of the Tennessee administrative law judges. These ALJs hear due process cases, and I will explain where they are situated in a

[88] College of Law Distinguished Professor of Law, The University of Tennessee College of Law, Knoxville.

minute. I talked to a handful—and there is only a handful—of parent and child lawyers. I spoke to people with our protection and advocacy agency, our parent training (PTI) advocates, and several legal services lawyers. Some themes about the way the system works came out. I'll specify these themes in a few minutes.

The system in Tennessee has evolved, probably the way many states' due process systems in most states have evolved. Immediately following the enactment of the IDEA, hearing officers were often school district personnel from other school systems who were called in to another school system to hear the few due process hearings that were filed. In the late 1980s, the state department of education went through a system of hiring on contract for a certain number of cases each year private attorneys from around the state. They were paid on an hourly basis. There was no cap, and lo and behold, there were much lengthier due process hearings as a result.

School systems called in lawyers from out of state to make matters even worse for parents. And the special education bar was very, very small during this era. Some of the private attorneys who served as independent hearing officers—they all had practices around the state in other areas—were really quite good, wrote very good decisions, and were very sensitive to the litigants. And others were not.

In 2007, the disability education community was able to get the Tennessee legislature to transfer the hearing function from this core of private attorneys to our current professional ALJ core, which is situated in our Secretary of State's office. They, too, hear a variety of appeals from agencies, from environmental cases, to Medicaid, to driver's license revocations, to what have you. Special education is a new function for them. Because the head of that ALJ group was a former student of mine, he asked me to come in and help train. I brought in Mark Weber, a noted IDEA expert, to train them with us.

This was in 2007. Since that time, 2007, there have been only eighteen hearings that have gone to a final order and only one in which a parent prevailed. Let me give you some statistics. In Tennessee, there are 993,256 students in the state according to the latest state report card. One hundred thirty-five thousand, nine hundred twenty-three are students with disabilities—13.8 percent.

Since 2008, as I mentioned, there have only been eighteen due process hearings that have gone to a hearing. Here are the numbers though. In 2008, there were 82 due process requests filed. In 2009, 42. In 2010—these are calendar years—46. In 2011, 88; in 2012, 59; and in 2013, 69.

So as you can see, there are cases being settled left and right in our system. For mediation in the school year 2012-13, there were only twenty-six

mediations held. And our ALJs also do the mediation, the way Ruth described in California. Of those twenty-six, twenty-two resulted in agreement.

State complaints, which are important in a state where there are not a large number of special education lawyers are much easier for a parent to file. There were eighty-eight state complaints filed in 2012-13. And twenty of these resulted in findings of noncompliance.

I went through all the state complaints and read through all the due processes hearing decisions. Of course there was only one due process hearing in which a parent prevailed; even that relief was not robust on behalf of the parent and the child. The state complaint relief in the twenty that prevailed was even weaker. Training, a little bit of monitoring and a promise not to do it again. Do what again?

There were complaints that children who were entitled to homebound services didn't receive them for six months. There were a lot of state complaints about IEP provisions or services not being provided and the like. So what's the problem with the system?

The problems that emerged I know a lot about from a project that I started at our law school in 2004. We called the project CAN LEARN—"Children's Advocacy Network Lawyers Education Advocacy Resource Network." CAN LEARN was part of a nationwide effort to enlist law schools to support small firm and solo practitioners, who carry a disproportionate share of *pro bono* work nationwide. We focused on special education.

We had four or five years of continuous efforts to recruit lawyers to do this work, to support them, and to do monthly webinars. And we built a small, small network statewide. And of that small network, maybe a dozen lawyers—I'd say today maybe eight or so—could identify as a special education lawyer.

So one of the real complaints that comes from the advocacy community is that there are not enough special education lawyers. There are not enough lawyers who are willing to take a risk to do these cases for statutory fees. The head of the state PTI said that when her advocates go to due process hearings with parents, they hear more often than they want to the school system saying, "Take us to due process," knowing that's not going to happen.

One of the interesting features that I noted in looking at the eighteen due process hearings was that—and I didn't follow all these cases through to whether they were appealed in federal court—lawyers, who I am virtually sure were not special education lawyers, were taking these cases on. And one of the conversations that we often have among the small special education bar in the state is lawyers who do this who don't seek out assistance from

lawyers who know what they are doing in the appeals process often make really bad law. And we have seen that on several appeals.

Counsel for the school systems vary. The hardball lawyers from the 90s had pretty much faded away, although, in one of the larger jurisdictions, there is still a private firm that has a reputation for playing hard-ball. There is one law firm in the state that represents probably about eighty of the approximately 125 school systems in the state. They are inclined to settle cases if it is in the interest of their client to do so, which it often is. And they do a good job at saving their clients money in doing that.

One of the biggest problems, of course, in taking a case through the resolution system is the availability of experts. And the fact that expert costs cannot be recovered in due process and beyond has been a major, major problem in our state.

And the availability of statutory attorney's fees, though real and though it happens—has been problematic. There have been major attorney's fees battles that generate a two-three-year litigation. Knowing you might wind up in a protracted fee fight is a real deterrent to attracting lawyers to this practice. Also, the administrative law judges do not hear 504 disputes, thus creating a separate system where representation might be needed, another deterrent to the availability of attorneys.

So, unlike D.C., this is a system where I think there is a suppression of complaints and a suppression of access to mediation and to due process. A lot of parents are basically lumping it and taking what they can get without going any further.

For the last five years, I have been teaching a clinical course that has focused on representing students who in Tennessee are prosecuted for the status offense of being truant. And the consequences of that in Tennessee can lead to incarceration through a valid court order.

It almost always leads to continuous court involvement. In three quarters of the cases in which we represented the students, there were serious special education issues. And most of them revolved around the fact that "Child Find" had not been meaningfully implemented. The students were placed back in school without any attention to their needs and ultimately started missing a lot of school. I will end with a quick story about our project.

We were at a big school meeting that the district attorney in our community calls several times a year, and parents whose children have missed five or more " unexcused" days get a letter saying, "You come to this district attorney meeting, or else," it says, "you can be prosecuted as a parent. And the child can be prosecuted. Your child could be removed from your custody."

We went to one of these meetings to hand out know-your-rights brochures to parents. We had a table in "Siberia" to perform this work. I saw coming out of the meeting a family, it looked like a mom and a brother wheeling a boy who had serious cerebral palsy. I went up to them, and I said, "Are you here for the meeting?" They said, "Yeah, I got this letter saying that my son has missed more than five days of school."

Well, yes, of course he has missed more than five days of school. The school was supposed to provide him with homebound services last year when he was unable to go to school due to serious illnesses. They had all the documentation of the boy's problems. The mom looked at me and said; "I got this letter from the D.A. It looks like there is another meeting. It says it is on 11–19." And I looked at the letter and the letter says, "If you don't come to this meeting and ultimately you are prosecuted, you could face 11 months and 29 days in jail because it's a misdemeanor." They were scared to death.

We have now taken on representation of this family. There is going to be no truancy that will be filed, I can assure you of that. It's a system that has very little coordination among the school system, among the juvenile court, among law enforcement, and most prominently, among the mental health agencies which are supposedly assigned to assist with these issues.

So there's a lot of work to be done. And that's Tennessee.

Erin Archerd: There are a lot of issues you brought out with Tennessee, especially the fact many students are not receiving some of the protections from disciplinary procedures that they should be under the IDEA.

Dean Hill Rivkin: In the five years of representing around sixty clients, we only filed one due process hearing. It was over an independent educational evaluation, which is a critical tool when representing families without resources. It's a critical tool, and the school system rejected our request and filed for due process. We sent them an old due process case that was directly on point, and they settled. If the family had not been represented by knowledgeable counsel, you can guess what would have happened.

Erin Archerd: Cathy, perhaps you will have a rosier presentation on Pennsylvania. I do know it has a long history of alternative dispute resolution in special education.

Cathy Skidmore[89]: In Pennsylvania we have a Bureau of Special Education which handles the state complaint process. We also have the Office for Dispute Resolution, which administers all the other special education dispute resolution options. Those include due process and mediation in Pennsylvania. I am one of six-full time special education

[89] Special Education Hearing Officer, The Office for Dispute Resolution, Pennsylvania.

hearing officers in Pennsylvania. We also have two part time contracted hearing officers.

One who hears gifted cases under state law. We have another part time contractor who handles conflict cases when necessary. The special education hearing officers do have jurisdiction over IDEA and section 504 claims.

We all have been trained, some training at least in mediation. But the hearing officers are not also permitted to be mediators. The mediators are part time. Some of the statistics that I heard are interesting, I only have the most recent for the 2012-13 school year. Pennsylvania had 757 due process hearing requests that year.

Our estimation is 85 percent of these result in settlement. When the Office for Dispute Resolution compiles the annual report, they have the number of decisions and then they have a large number of cases that were active at the time of the Annual Report. I am not aware that there is a way to specify the settlement numbers much better than that, but we have a fairly good settlement rate in Pennsylvania.

We have a very active parent bar. I heard it said in other states that there are not enough special education attorneys, but I don't think I would describe many of the regions of Pennsylvania that way. LEAs must be represented by counsel. Parents may choose to represent themselves. We do not permit lay advocates to represent parents at hearings. The parents can bring them with them for support, but advocates cannot represent parents.

In the 2011–12 school year, approximately 25 percent of final decisions were in cases with a pro se parent. That's significant because we have anecdotal reports that cases involving pro se parents are somewhat less likely to settle.

I want to mention some of the things that we have tried to do in Pennsylvania to help parents who are not represented because we know it's very difficult, it's very overwhelming.

The hearing officers last year created a four-part video series on what to expect from the due process hearing. They are available through the website. We have gotten really good feedback from parents about those videos.

We have a new guide for parents on understanding due process. The Office for Dispute Resolution is also developing one for early intervention matters, and there is a separate guide for gifted cases. It's a large guide, with a big download, but it's helpful for parents as well.

Some of the things we have tried to do, similar to what I know Esther mentioned earlier, we have tried streamlining the process. The hearing officers have created and developed what we call prehearing directions, which are in essence guidelines we give to everybody before the hearing starts. In those guidelines or directions, we set forth, here is what we are

anticipating and will do to make the process more efficient and not take so long. We try to limit the hearings to two to four sessions per case. Another thing we have done is provide guidance on how we will consider expert reports. We permit parties to submit expert reports. If the expert does testify, we generally allow limited direct testimony such as providing background information, but the expert report serves as the substance of the direct expert testimony.

We have a number of dispute resolution options that go beyond those in the IDEA. For example, we have IEP facilitation, as well as resolution meeting facilitation which is typically conducted by the same people who do IEP facilitation and mediation.

In the summer of 2012, we started using the evaluative conciliation conference, a form of settlement conference where someone who has experience as a special education hearing officer consults with the parties to assess the case, and the matter can proceed to a facilitated settlement discussion if the parties want to do that.

That's a voluntary option. A recent pilot involves conducting conflict coaching. That's a pilot where they are providing training to educators, administrators and parents and parent advocates on conflict management skills they can use for increasing the ability to collaborate effectively in special education. We also have a couple other side projects in PA, where we are exploring the feasibility of conducting virtual hearings by webcam.

We have had great interest from the special education bar in Pennsylvania. I am amazed at how many people have volunteered to work on this pilot project. One of the aspects I have had heard feedback on that I hadn't thought about in too much detail, parties consider virtual hearings might provide them with an environment that is not as intimidating as it is to sit in a hearing room with the party you are disagreeing with. So that's one possible advantage of virtual hearings. That's still in the early stages that we are exploring.

Then we are getting ready to start a pilot on using electronic exhibits rather than the stacks of paper that we are used to seeing.

Erin Archerd: So Ruth, I know you want to talk more about Ohio, but let's finish up with Illinois and we will return to Ohio. Mark, can you tell us about Illinois?

Mark Weber[90]: Thanks for the chance to do this. I should mention that I don't do much in the way of active practice, being a full time law teacher. What I did in gathering information was to talk with a lot of lawyers to see

[90] Vincent de Paul Professor of Law, DePaul University, College of Law, Chicago, Illinois.

what their experience was. I think some fairly interesting things that came out of that. I didn't do polling or statistics.

One word of caution, in Illinois and perhaps other places, a fairly large number of hearing requests are initiated by school districts looking for permission to evaluate kids. Needless to say, parents don't prevail in those cases because most of the time, those cases are where parents haven't responded at all to an evaluation request. It skews the result statistics if you throw those numbers in.

I should say in terms of background, Illinois has a one-tier system. We have contract-hearing officers who do only special education. They do it on a part time basis, although there is discussion about making it full time. There is a very elaborate selection process for the hearing officers that involves the state attorney general as well as the state board of education. There is periodic training. Professor Zirkel, who is in the audience, has been doing that off and on. There are other folks who have done it as well, on the basis of a request for proposals process.

There are essentially three topics I can tell you about from the information I was able to glean from my talks with lawyers. First, about settlement and alternative dispute resolution. Second about hearing procedures. Third about what issues are contested and what outcomes people are reporting.

With regard to settlement and alternate dispute resolution or appropriate dispute resolution: There seems to be a wide consensus that the resolution session is not useful. Mediation was a lot more popular. There was a bit of consensus that the success of mediation depends a great deal on who is assigned by the state to do it. There was also some feeling on the part of lawyers that unrepresented parents in mediation might easily be taken advantage of. I don't have specifics to evaluate that claim. I did hear from a few lawyers about districts reneging on settlements, either those reached in mediation or reached through hearing, and a lot of difficulty trying to enforce settlements. I think that's a big issue. One of the untaught areas in law school is the law of settlement. Most cases settle. Very few lawyers have any idea how to make a settlement stick or what to do if it doesn't. That appears to be true in the special education realm as well. I did hear from at least one lawyer that he was getting more and more offers of settlement that involved getting a sum of money in exchange for the parent waiving all of the child's special education rights, either for a long period of time or in perpetuity. It's somewhat difficult to find authorities saying that it's somehow unconscionable to do that. Esther identified the increasing use of litigation insurance. It may be that the folks who are working for the insurance companies are quite comfortable with parting with a fair amount of money if

the problem goes away. Of course, in special education, it rarely goes away altogether.

Finally, on the topic of settlements, I sat down with one lawyer who said, "It's funny, the lawyers for the Chicago Board of Education are much more willing to settle cases recently. I don't know why, but I think that it's because there's so much administrative chaos going on there that nobody is telling them that they can't." This is an interesting insight. I won't say whether the perception is necessarily correct. But it does indicate that sometimes an absence of authority produces more settlements than people knowing where their authority lies.

On hearing procedure, the first thing that I heard from lawyers was that there has been a big increase in motion practice. Many more motions to dismiss, motions for summary judgment, even motions in limine, the motion to suppress evidence which is ordinarily used in civil jury trials.

The second aspect of that is that the lawyers have mixed feelings about this development, but they uniformly felt it terribly disadvantaged unrepresented parents.

The third thing was simply a report about what issues and what results have been the trend recently. There were about four different areas that were mentioned. First is private placement. Those often generate hearing requests, but lawyers told me that these were the cases most likely to settle, because a private placement was a way to get the child out of the school district and make them someone else's concern for a while. Second, post-secondary transition also seemed to generate hearing requests, but again lawyers told me those cases seem more likely to settle than they used to be because the school districts are now more sophisticated in the services they are willing to offer. Third is early childhood applied behavioral analysis-type autism services. The report was those cases seemed to be less likely to settle in the current era. Lawyers said that more school districts have developed their own in-house, in-district programs. Once the district develops the program, it is reluctant to bring in outside services, which is often what the parents want. So those cases are more likely to actually result in a case going to decision. What seemed to be the most difficult case to settle and some reported the most difficult case to win is the fourth area, where the parent is looking for a less restrictive environment with a lot of supportive services for a kid who has fairly severe needs but the parents want to keep in the mainstream. The district is more likely to want to simply send that kid to a private school, rather than trying to vary their standard operating procedure and try to accommodate the kid. So those cases tend not to settle and have mixed results at best when they go on to hearing.

I think it shows the complexity of the system that I can't tell you for sure whether people are generally happy with due process or generally not. A lot of people complain, but a lot of people complain about everything, particularly if they happen to be lawyers. As for supply of lawyers taking special education cases, there are a fair number of lawyers who represent parents in Chicago, although frankly some of them describe the practice as economically a loss but a field where they think someone should be doing it. They know if they are not doing it, nobody else will and they try to balance off with other parts of their practice that are a little more lucrative. Downstate, I am concerned there are not many lawyers to serve parents looking for representation. That's where you get a lot of pro se parent cases.

Erin Archerd: Phil [Moses][91], you wanted to add something?

Philip Moses: I wanted to ask a question. You mentioned something about resolution meetings, a consensus around it?

Mark Weber: That they were not a valuable process.

Erin Archerd: When we have our panel discussion, that's something I am interested in talking more about. Ruth, I think that Ohio is the only two-tier hearing system among the panel at least? I don't know if you think that makes any difference, if you want to speak to that when you talk about Ohio.

Ruth Colker: Yeah, I mean, it's a little silly to talk about Ohio when many of you know more about Ohio than I do. Let me give you general information about Ohio.

In Ohio, we do have a two-tier hearing process, one of the handful of states that does that. From my perspective, it really is a delay of process because almost in every instance, the second tier hearing officer follows the first tier hearing officer. It's hard to see there is much value by us having a two-tier system.

I welcome anyone else's thoughts on that. I will just talk generally about some issues that I see in Ohio.

Ohio has both a written complaint process and a due process hearing process. We haven't talked so much about the written complaint process. As Dean Rivkin mentioned, the contrast is really interesting. The written complaint process is parent friendly and you don't have to hire a lawyer to fill out the form to say you have a complaint about the way the school district is handling your child's situation. So in Ohio, we have many more instances of parents filing written complaints than parents going to a due process hearing.

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[91] Associate Director, The National Center on Dispute Resolution in Special Education (CADRE).

In 2013, I looked at all the complaint resolutions as well as hearing officer decisions that were placed on the state's website. We had 81 complaints resolved through the state system and 11 due process hearings. Of the 81 decisions, the student prevailed on all issues in 22 % of cases, the district prevailed on all issues in 36 % of cases, and 42 % were mixed, in that the student prevailed in some but not all issues.[92]

I read each of the 81 decisions, and I was pleasantly surprised by the resolution process as well as by the kinds of issues that were resolved in the students' favor through that process. I thought those were promising results that maybe more parents should be aware of.

The kind of issues included simple things like who should attend an IEP meeting. But there were a handful of cases in which the parent complained about the content of IEPs. I was surprised that I saw more cases in Ohio where the parent was successful when the parent used the complaint process to challenge the adequacy of an educational plan than when the parent used the due process hearing officer process.

It looked like the investigators were willing to read the IEP's and really look closely at the goals, et cetera, that are written in the IEP's and say are those the kinds of goals that were appropriate under the IDEA, or are they too vague and immeasurable and not appropriate?

I don't find that kind of analysis as common as a result of the due process hearing. That was an interesting and surprising finding for me. In the hearing officer cases, there were complaints about delays in classifying a child as disabled, sometimes up to a year. Parents often have a big issue with delays. When parents used the written complaint process, they could have that kind of problem resolved quickly. Having a decision rendered in 60 days is so much faster than what happens under the due process system. So that is very promising to happen quickly.

So, the written complaint process, it's less than perfect, but I was pleasantly surprised with how that process worked. I wondered why these results were so satisfactory and wondered if that was because the complaint investigators were employees of the state rather than independent contractors (like the hearing officers in Ohio). In California, however, I found that the hearing officers – who were employees of the state – did not do an effective job. So being an employee of the state didn't seem to predict the fairness of the outcome. So that was interesting to me.

By contrasting Ohio, I would say, however, I am not satisfied with our due process hearing officer process. We don't have a lot of hearings these

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[92] For further discussion, see Ruth Colker, *Special Education Complaint Resolution: Ohio*, 29 OHIO ST. J. ON DISP. RESOL. 371 (2014).

days in Ohio. It's difficult for me to follow the results of the hearings because the state has been very slow in posting the hearings despite my repeated complaints about that. Right now, we have 11 cases that I am aware of that were decided in 2013 in Ohio.

So I could talk about statistics, but I don't think they are meaningful with a small numbers problem. In contrast to the written complaint decisions, I cannot characterize the hearing officer decisions as highly professional.

The school district pays for the hearing officer on an hourly basis with a cap on the hours they can expend. That cap is often exceeded. We often have several-week hearings, and we have one hearing officer who issues decisions that are 220 pages long.

To me, that's inappropriate. These are decisions that I agree with the result. The point is that it's justice delayed and denied. It takes this hearing officer up to a year to render a decision. It's a year of lost education in a child's life. It doesn't matter what the content of the decision is. That's a loss for that child.

I have had lawyers on both sides of the table who represent school districts and parents describe the hearings in Ohio as the wild wild west. We don't have rules. We don't have structure. It's a motion practice and other times it is not. A lawyer doesn't know what to expect coming in. In terms of delay, it's unconscionable. A hearing officer can take 7 months to schedule a two-day hearing. It could take a year for a decision after a complaint is filed. That to me is entirely inappropriate.

When you read the decisions themselves, they are difficult to follow. In one case, it looked like the decision ended mid-sentence. I thought the hearing officer pushed the send button too quickly. The decision was riddled with typos and grammatical errors.

The redactive process is also problematic, sometimes the hearing officer use white-out or some other way to redact confidential information. Sometimes they redact so much, you can't understand the decision. You don't see any test scores. This is about a student who has blank disability and blank achievement — you know, that to me isn't a way to inform the public about what happened. I can't use this.

There are errors in the databases and decisions. The decisions will have the wrong id label. A second-tier level decision will be labeled as a first-tier level decision. That's confusing. Hard to figure out what's going on.

So to me, it's not a satisfactory situation. This system is not one that's working effectively for anyone. The school districts are not happy. The hearing officers seek extra hours for compensation from the school district. The parents are not happy, the cases drag on forever. One parent lawyer, however, did comment that having the school district paying the hearing

officer does give the school district an incentive to settle. That's an interesting incentive.

I wish there would be incentives without a system that on its face looks like there is an ethical problem that some parents perceive the hearing officer is working for the school district. If you understand it, that's how the payment is taking place, and that creates an odd appearance. I think there's a lot of room for improvement in Ohio with respect to the hearing officers.

I take solace in the fact that the complaint process seems to work much better. In Ohio, we have these two starkly different systems, both run by the state agency. So I know that we can do better because we are doing better in the complaint process. Maybe we can look at some of the other processes that other states are using that generate more professional fair hearings that are decided on a timely basis.

Robert Dinerstein: One of the cases that we have, the complaint before we came to us went through the state process. In terms of the analysis, I would agree with you. It had to do with an issue whether or not the student was receiving a communication device and also help with toileting. When we looked into it, the issues that Mark talked about, whether or not these get implemented were very clear. What we found out was, even though the District hadn't implemented the program the state agency sent us a document that said they are doing it. That's the end of it.

We know from our own client's observation, they are not doing it. At some level, maybe they are doing a better job of documentation on the surface. It did leave me with the concern, especially because it's a parent-driven process, that the parent may not know enough to ask follow-up questions on whether or not the relief is being implemented.

Erin Archerd: I imagine most people here are fairly familiar with the process of when you have some sort of complaint, what route you might take. We talked about a few different routes. There is the due process route, along with all of the other associated pre-due process hearing dispute resolution options that are either built into the federal statute that states are coming up with in addition to options required by the IDEA.

Then there is this idea you can file a complaint with your state. So a state complaint in which case then an agency will have an investigator who will then go and investigate your complaint. So I'm interested from the panel's perspective how these are working.

Esther, I might start with you. Do you think that in jurisdictions where the burden is shifted to the schools in due process hearings, that the state complaint becomes less appealing because when the burden is shifted, the investigation becomes less of a plus?

Esther Canty-Barnes: That's a totally different issue. The burden of proof issue is a legal analysis in the context of a due process hearing issue. If you are saying whether it makes a difference in New Jersey, whether it's on the parent, I would say in some cases, yes, and in some, no.[93]

The brief period of time when the burden of proof was on the parent, was a very dark time in New Jersey. That coupled with the fact that the IDEA allowed attorneys' fees to be obtained by school districts, caused a chilling effect in New Jersey. Attorneys were afraid to file due process complaints for parents unless they actually knew that there was a substantial violation of some kind. They were afraid to file. They were afraid to file because they also had the ultimate burden and to present their case first. What that meant was, if they had to go first, they had to be prepared with experts. Many of the clients we represented do not have the resources.

We did not have the experts and we would have had to go through the independent evaluation process which sometimes even lengthened the whole process because school districts took their time in giving you what you wanted or they would file for due process.

In New Jersey, if the School Districts believe that their evaluations are appropriate, within 20 days, they must file for due process to go before an administrative law judge to prove their evaluations are accurate and appropriate. That sounds like a totally asinine process when you think about since parents have a right to independent evaluations. If you are asking for an independent evaluation to assist the parent in the whole process, and the parent has nothing on which to base his or her claim, the only support that you may have is cross-examination. This puts the parent in the position of either paying for an evaluation to prove that an independent evaluation is warranted or going along with the poor evaluations provided.

Unless it was a totally inappropriate evaluation where the evaluators failed to observe the disabled child in the classroom or where they didn't do all the testing that was required, the case would be difficult to defend even where the burden is on the district. It's certainly very difficult to litigate these cases without experts. Once the district puts on its case and its experts testify that the evaluations and education is appropriate, the burden then shifts. All the district has to do is meet its burden by a preponderance of evidence.

In terms of the burden of production, it made a difference in terms of who went first. Often, there were issues of discovery and accessibility to district employees and obtaining relevant information. But I don't think it

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[93] N.J.S.A. §18A: 46-1.1 (2008)(Placing the burden of proof and production on school districts).

really makes that much of a difference in New Jersey in hindsight when you look at the decisions.

Prior to the decision in *Schaffer v. Weast*, New Jersey had a long history of placing the burden of proof on school districts under the New Jersey Supreme Court case of Lacari v. Board of Education of Ramapo Indian Hills School District, 116 N.J. 30 (1989). Which placed the burden of persuasion and production on school districts. After *Schaffer* the climate changed. When the burden of proof was on the parent there seemed to be an effort to almost give too much credibility to the school district. But when New Jersey enacted its own statute placing the burden of proof (both persuasion and production) on school districts, it certainly seemed that there was a lesser standard required that was consistent with a preponderance of evidence. It seems as though there was a different standard when the parent had the burden than when the district had the burden, in my opinion.

It might not have been the case in actuality, but that's what it felt like to me. Every time you went to a hearing, the judge would say, you had the burden. It was like a mantra, you have the burden. You do have to show something. You must have experts. So how are you going to win if you don't have experts even in situations where the district obviously did not meet its obligations?

Erin Archerd: So even if you don't have the burden, you are still incentivized to bring your experts if you want to win.

Esther Canty-Barnes: You have to prepare as if you have the burden.

Erin Archerd: Has anybody else seen a phenomenon where state complaints, because there is that investigation capacity, become more attractive to parents?

Mark Weber: I think I could probably report a consensus that goes in the other direction among parent representatives where I am from. It may be a stupid joke, but the common saying is that CRP, the acronym for the process, is basically the sound you make once you get the result.

Erin Archerd: So the investigations rarely go the parents ways and so they have very little incentive. Dean?

Dean Hill Rivkin: I agree, and the statistics show that our complaint process doesn't work. What was it? Twenty parents prevailed out of eighty-eight in 2012–13. But the time frame in our state, and I think it is sixty days. There's some response from the State within that time. I have also found many parents who have the capacity are able to express themselves in this informal way. They get a response back. It often isn't satisfactory, but there is some sense of having a response from the system. Whereas going through due process because of all the infirmities and what have you that we have been talking about, very often that's not satisfying.

One thing we didn't mention and that we used over the years when there have been receptivity is OCR complaints. There are times when OCR complaints have been more effective than state complaints because we have had good people in the OCR region. A lot of these complaints and a lot of these issues are by OCR. When the Feds come in, it makes a difference to a school system, in our state anyway. That's another sort of complaint route that doesn't require all the expense, the contentiousness, and the complications that due process has evolved to, at least in my thinking.

Ruth Colker: I got a note to myself to talk about the OCR system. It's a complicated question. We are aware of the fact under § 504 that it is hard to get OCR to take a case unless is really isn't an IDEA case. But even that is hard to move forward on. It is difficult to get our Cleveland office to take § 504 cases that are not IDEA cases because they want the parent to exhaust their IDEA rights before filing under § 504. Nonetheless, I have had some success with OCR complaints.

Dean Hill Rivkin: Tomorrow, are people going to talk about 504 complaints?

Erin Archerd: Was there a question in the back? Paul [Grossman]?

Paul Grossman: I will hold my OCR discussion until tomorrow. But I just wanted to suggest because of the 504 population, I would like to suggest four variables to explore this issue further. One is when you gave statistics on how many students with disabilities are in your educational system, I wasn't clear whether that was IDEA students or IDEA/504 students. My suspicion is that 504 students are doing worse off than the IDEA students because IDEA has a more robust due process system.

Secondly, there has been discussion to have a better contract with ALJs. I wanted to add to Ruth's picture for California, for many years, the law school had a contract with all ALJ's. When they went to a state employee system, now grant you they are well educated articulate ALJ's, but the number dropped to 20 percent. That's a big difference. But I'll grant you the law school model might be a superior model to the just contractor model. It's a little different than just the Wild West.

Another variable is can a hearing officer hear 504 issues?

Then as he said, some states they can and in many states they can't. I think it's unfortunate when they can't. School districts would call me and say "can you give me the name of a 504 judge because they are hard to find." To me, it's both a disservice to the parents and the school districts if they can't do that.

Finally, at the moment, this is probably a 9th circuit only issue. I think it will become a bigger issue for students who are deaf and hard of hearing, blind and low vision. There is now a beyond FAPE standard, Title II

standard. And a very interesting issue to study would be, for individuals who can address this disability discrimination under Title II, how well do they prevail as compared to people who are still within the state due process?

Erin Archerd: I wish one of our other colleagues Chris Walker was here today. Several years back, he started to think about some of these issues that is, are there better options than the IDEA in certain circumstances for individuals with disabilities. And I think that is a good question. Does anybody want to bounce any ideas or reactions to any of those points?

Esther Canty-Barnes: In New Jersey, our regulations provide for relief under IDEA with respect to § 504 and our ALJ's, have jurisdiction to handle these matters.[94] We often allege § 504 violations as well to ensure that these issues are reserved on appeal.

Mark Weber: It seems when I have been talking with lawyers on that topic, I got two typical reactions. One of which is, if you have a viable 504 claim, that claim might get you damages and provide leverage when you settle the case. I see lawyers who think of § 504 as damages more than anything else. And second, taking a word from Perry Zirkel, there are those who see 504 as something of a consolation prize if you can't prevail under IDEA.

I have tried to persuade people is that 504 really is a separate claim that might provide in some instances a higher standard for what the school district has to do as well as providing different relief.

Dean Hill Rivkin: We have been using 504 a lot in our representation in truancy where we have students with school aversion, school phobia, or some very hard condition to classify. 504 has seemed like a route to get a 504 plan that makes sense for some of these students.

I agree with Mark completely. The dispute resolution under 504 in Tennessee, anyway, is that the school systems get to appoint their own hearing officer for 504 hearings. So in many ways it's sort of back to the old due process days in Tennessee where you call up the next school district and get somebody.

It's not very satisfactory. And you don't have to do it, but then you have to have federal judges who will be more sensitive to what this is about. It's a tough call.

Erin Archerd: Are there any other comments? In the back—Perry [Zirkel]?

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[94] N.J.S.A. §6A: 14-2.7(w) (Although the N.J. Administrative Code provides that requests for Due Process hearings with respect to issues concerning § 504 are processed in accordance with Title 6A, these matters are not heard strictly on § 504 matters.).

Perry Zirkel[95]: I want to react what Ruth said about exhaustion. If I heard you correctly, I think you are confusing the adjudicative route, whether it's IDEA or 504, with the administrative investigative route, whether it's OCR or the state complaint resolution process (CRP).

If you file a complaint via this alternative route, the agency may defer, but it does not require exhaustion. There is no problem with filing a complaint with OCR.

Ruth Colker: Right. I agree with you. But if the parent has filed for due process under IDEA and filed simultaneously with OCR.

Perry Zirkel: Right, that's the deferral.

Ruth Colker: That's right. It makes things very complicated that you can't be pursuing in that situation both of them simultaneously, because they are going to wait.

Perry Zirkel: From an advocacy point of view, you have, at least for an IDEA type of child, four avenues—two under the IDEA and two under section 504. Using them artfully can really maximize the chances of getting relief for the complainant.

I find many attorneys that just think about IDEA due process, I am delighted to hear these other alternatives that are mentioned here. To piggyback, is we have so much attention, literature and research on due process hearings, but almost nothing on the CRP process. I've talked to the folks at Seattle folks and CADRE without success, we never have a symposium, research, or any similar example on the CRP process. Yet in some states, it is far superior.

One of the advantages of it, by the way, is that the courts have developed this watered-down version when it comes to procedural violations, making it a two-step process. The typical CRP process does not ask a second question. And when you get these folks well trained and accountable, with remedies like compensatory education, it's not a little victory where they not only order changes but also actually give compensatory relief. I find it to be a wonderful avenue.

Dean Hill Rivkin: I think we can maybe get a question. But return to Mark's comment about—and Bob's experience with settlements and enforcement—maybe you are having a session tomorrow, I think, on enforcement. But one of the lessons that we learned early on was it's really important to mine your state's administrative procedures act, whatever it may be called because state APAs are often very different from—not significantly, but different enough—from the federal administrative procedures act.

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[95] University Professor of Education and Law, Lehigh University.

So that early on when we won a due process hearing and the school system refused to implement the relief, we found a provision in our state administrative law act that allowed us to go—we have a chancery court—in a very simple, very rapid way and get an injunction to force the school system to implement the relief.

We all have different legal contexts, but we found that to be quick and simple. That's why when I came to D.C. and saw these cases where the relief had never been implemented, I was puzzled to say the least.

Erin Archerd: Do we have a question in the front?

Eloise Pasachoff[96]: I am Eloise Pasachoff. I teach classes in education law and legislation and regulation at Georgetown.

What is the value of having all these different disputes resolution systems? It's fascinating to listen to all of you describe the practice in your state. We are all sort of taking for granted that this is the way it is, that there are all these different practices in all these different states. We are all under one federal statute but with different state administrative procedures in a whole lot of ways.

I guess the question I am asking is, do you find a sort of laboratory of democracy value in having Massachusetts' system so different from Ohio's and from California's systems? Are there on the ground requirements why all these state implementation systems should be so different? Or is this something that either in an ideal world, you know, should Congress get a different and possibly better unified dispute resolution system in place? Is there some value in all of these different — I hear the titter in the back which means nothing will happen. I share that idea. This is more of a design question. Is there some value in it? Or is there not?

Dean Hill Rivkin: In theory, disputes should never get to the dispute resolution system in the first place. A lot of lawyers who represent parents and kids don't go to IEP meetings—typically lawyers in private practice because they know that IEP meetings are lengthy and laborious. We go to those meetings because we are able to get what we want in the IEP meeting. We never have to invoke due process or rarely have to invoke it whatever the system is.

So can Congress somehow incentivize school systems to do better in IEP meetings? That would be terrific. Beyond that, a rapidly responsive system would be ideal—parents want to be able to express their grievances with what's going on with their children. And I think the current system—my former student who is the former head of the hearing officers, he said, "I just saw the system became so laborious and that." he said, "is a main reason in

[96] Associate Professor of Law, Georgetown Law School.

Tennessee anyway why parents aren't invoking it very much." I don't know if that answers your question.

Robert Dinerstein: It's an interesting question. Whenever you are involved in a system, you can be so connected to it, particularly the way your system is structured. One advantage of this conference is to hear, oh, gee, you have a different way. To me, I would come at it thinking, the ability to have a due process hearing empowers parents to be able to be equal — at least to get closer to the equal playing field to bring about a team approach and not what professionals dictate to parents. It doesn't work that way.

One of the problems is that because everybody has got used to the background noise of due process, in some ways it increases the chances for resolution because the school says, well, we don't like to go to due process. That becomes a standard response.

We had a very bizarre case in which we had gone to due process and lost. Our client's son was in a nonpublic school. We tried to fight the proposed transfer to a public school and couldn't prove the school couldn't provide FAPE. But we agreed to keep him where he was for the rest of that year. (The hearing officer issued his decision in March of that year.) We had an IEP meeting in the summer. In the meeting, the team's clinical psychologist said, "We have done a pretty good job here in dealing with this young man's learning disability. But, we are seeing some emotional issues there. We haven't done a full assessment yet, we think that — by the way this is a kid who does not deal with transition very well. So if we do an evaluation, if it turns out he has got emotional issues that were not part of the due process hearing, we might reevaluate where he should go." The representative from the local educational agency (LEA) said, "I agree with you, he should be evaluated, but we can't authorize it. If you want him to go through an evaluation, you have to go through due process."

They all agreed he needed an evaluation but the LEA would not approve one. So we filed a due process complaint, primarily just to keep him in the school for the evaluation. We requested mediation, they agreed to it. We had a mediation session right at the end of the summer before our new clinic students arrived, so I represented our client. The mediator asked me to explain what our position was. I explained it. The mediator turned to the representative and said, "So what's your position?" The LEA representative said she agreed with the student receiving an evaluation, and further agreed he could stay in the nonpublic placement until the evaluation was completed. This result easily could have, and should have, occurred at the earlier IEP meeting, but we had to draft and file a due process complaint and have a mediation session to obtain it,

By the way, and this is maybe what you meant by the problems of the system benefited us once the evaluation was approved the next issue was identifying who would conduct the evaluation and when it would occur. Nine months later, it hadn't been done. We weren't unhappy because the student was in the school in which our client wanted him. Five years later after, he never went back to the public school because we were able to advocate in other forums, including at later IEP meetings, to keep him in different nonpublic schools. So, this is a long answer just to say that it wasn't so easy for the school rep to say, go to due process.

Erin Archerd: I want to add we have an entire panel on dispute system design.

Eloise Pasachoff: I am speaking on the panel. But more—my question was—this was not a question challenging the value of due process. This was a question of should Congress say that we should have a one-tier versus two-tier process. Who should be paying for the evaluation? That was my question. The dispute system design you have been talking about, how your state, where the administrative law judge who is paying, et cetera.

My question is: Is there a value in the diversity of those administrative design practices or not?

Michael Gregory: I think we can disaggregate this question into two separate issues. One issue is the uniformity of the due process hearing itself—the way hearing officers are hired, whether they are full time or independent contractors, the format of written decisions and how they are reported, etc. As we have heard, there is so much diversity here, but if there are certain practices that seem to result in greater justice, then maybe these aspects of the due process hearing should be uniform across the country. I would preserve, however, states discretion to come up with creative dispute resolution options that are *alternatives* to any be uniform due processes proceeding that might be instituted nationwide, so that we can continue to have creativity and innovation as well.

Cathy Skidmore: There is so much disparity in the way states experience due process. There's one state where there are few due process decisions and another state where there are more.

Mark Weber: I do think there is a little bit of a laboratory of democracy going on here and there. For example, there has been a gradual movement from two-tier systems to one-tier. Having the variety of processes over time will help to work out the best solutions.

There are so many differences of culture among lawyers and practice generally. I am not sure even if you tried to work out a uniform system, you would necessarily induce that much more uniformity in practice.

A few years ago, there was a big issue that academics were talking about regarding proliferation of local rules by federal district courts. It turns out that the local rules were mostly just codifying unwritten practices that the courts applied before the rules came out.

Ruth Colker: One thing I think is problematic, the parent has to learn a different due process system so the student can get an appropriate education each time a family might move. So I have talked with parents who have had that experience as they move between states or even within a state. I don't understand—why would we want a child to get different services—in a single state there is enormous variation. I would like to see more uniformity as to what is appropriate and adequate in providing students a more standard expectation.

I don't know that the due process hearing system—if there is one thing I would change at a national level, there are so many variations in what services are rendered. I would like to ensure that all students have adequate representation when they walk into an IEP meeting. To me, that's the greatest injustice, most parents walk into IEP meetings without a lawyer. All of us have gone to IEP meetings that the outcome is extraordinarily different when the parent has someone there acting as their advocate.

I wish there was some way to say to Congress, you are spending all this money, can you find ways to get parents better advocates? That's what we need to achieve more uniformity nationally.

I guess it's a cause and effect problem. It's not clear to me with the differences in outcomes that they are caused by differences in the hearing officer processes from state to state.

Erin Archerd: I wonder if some of the variation between states in terms of the upstream offerings, whether that's IEP facilitation or settlement conferences or something of that nature is trying to address those concerns that you were expressing.

Was there a question?

Speaker: I was going to make a comment. One of the big values of this kind of conference is to really hear what the other states are doing. I do think that what we need to do is take back the lessons learned.

From what I am hearing, there are some things working better than other things. Hopefully, we go back to our states and try to make those adjustments. Unless decisions are issued in a timely fashion, unless the hearing officers are impartial, unless those basics are in place, I can't see that this could be beneficial for parents or students.

Perry Zirkel: The idea itself was built on this concept of cooperative federalism, and state laws purposefully allow for variety. When you look at

state-by-state differences, which has been helpful here, one of the things we otherwise often forget is, for due process hearings, there are two worlds.

One world is six jurisdictions that account for 90 percent of the adjudication activity. And surprisingly — I would put D.C. on the top as well – but according to the last six years of data that OSEP collected, when you look at adjudications, i.e., cases actually decided, for the six leading no one would guess which one is number one. I was shocked I kept questioning it. It's Puerto Rico.

If you look at the number of adjudications, Ohio, Tennessee, and the vast majority of other jurisdictions are in a totally different world than Puerto Rico, D.C., New York, California, Pennsylvania and New Jersey.

Robert Dinerstein: One thing on statistics. It's interesting you spoke about absolute numbers and then there is per capita. Hearings for 10,000. D.C., in 2010, 229.3. California, 1.6. Puerto Rico, 71.1. So in absolute numbers, you're right. Given the size of D.C., much smaller than the size of Puerto Rico, we are still....

Perry Zirkel: Requests or actual hearings?

Robert Dinerstein: Actual hearings. For complaints that were filed for D.C., it was 1278.1 per 10,000 students; it's off the chart, literally.

Perry Zirkel: The point is, even on a per capita basis, the limited number of jurisdictions account for most of the adjudications . . .

Robert Dinerstein: Right.

Erin Archerd: There has been some mention of resource allocation. We talked about it. And we talked about the IEP, whether it's facilitation or mediation. I know the ADR design, we will talk about tomorrow, but I was struck by the numbers in the different states you spoke about mediators versus hearing officers, especially in New Jersey where you said there are something like 36 hearing officers and five mediators who were also investigators.

Esther Canty-Barnes: In New Jersey there are five persons designated for complaint investigations and five serve as mediators. I am told that sometimes they switch over to assist when the need arises. Although New Jersey has many ALJs, there is a need for more since they are no assigned exclusively to Special Education cases.

Speaker: I keep hearing the number is down for mediation. Mediation is viewed in the field to work with ongoing relationships. What better ongoing relationship lab do we have than an age 3 to age 22 student in a school district. I am interested in hearing if any of the states are pushing mediation.

Esther Canty-Barnes: What has recently happened in New Jersey is that the U.S. Department of Education has found that New Jersey is out of compliance in terms of who employs the mediator.

Mediators are currently employed by the New Jersey Department of Education. The U.S. Department of Education has indicated that this is a conflict with the federal statute. NJ OSEP has to develop a plan to shift those mediators to the Office of Administrative Law. They will become employees of the Office of the Administrative Law as of 2015, once they settle other issues. However, they will still be housed at the New Jersey Department of Education, which is another issue.

Erin Archerd: That's interesting to me. My understanding was that other states that also used that model. Do any of your states house your mediators within ALJ-type agencies?

Speaker: Massachusetts, we have the same housing. OSEP found that hearing officers, there was a problem. We were transferred—the mediators are now under administrative law and it was seamless. It makes no difference. There may be other issues. But it was seamless.

Robert Dinerstein: The complaint that lots of people in D.C. had about both mediators and also facilitators, not the same thing, is that there was the perception if they weren't knowledgeable about IDEA or special education, they were much less effective. One of the concerns was not so much the agency they are part of, but what do they know about special education.

One of our former chief hearing officers also did mediations from time to time; people on all sides saw him as quite knowledgeable and when he was involved, he was effective. After a couple of years, though, he got frustrated with the process and stopped doing mediations.

Erin Archerd: I had this question when you were talking earlier about how you don't feel like people are coming to mediate in good faith. They don't have authority, they can't do anything other than say yes or no. Has anybody else faced similar issues in their state?

Esther Canty-Barnes: Absolutely.

Erin Archerd: Mark is just shrugging his shoulders sadly.

Mark Weber: I don't think it's unique, particularly.

Robert Dinerstein: One thing I would add because it's interesting in terms of our jurisdiction in D.C., we have Maryland across the way. Some of the lawyers represent clients in multiple jurisdictions. They will say I do a lot of mediations in Maryland. It's effective there. It doesn't work in D.C.

One thing you might worry about, maybe it's defense attorneys who are not interested. That could well be true. At least some of the people who are doing a lot of litigation actually value litigation.

Cathy Skidmore: I wanted to mention in Pennsylvania, we have many more mediators then we do hearing officers. It has been available for special ed. mediation. It's very underutilized. I don't know why that is, but I think

Pennsylvania has done a great deal to provide resources toward mediation and to make known its availability as an option.

Erin Archerd: Your mediators are also serving as IEP facilitators?

Cathy Skidmore: Some of them do.

Erin Archerd: Are the districts letting parents know that's an option?

Cathy Skidmore: I do think generally that the districts let parents know that IEP facilitation is an option, yes, they do. But again for some reason, I'm not sure why, there are probably many reasons, mediation is just not a widely used option in Pennsylvania. That gets back to the question earlier about universally mandated options. An option is only effective if people use it. The states will have varied success with different options, quite possibly.

Erin Archerd: Reece?

Reece Erlichman: I was curious about the number of mediations that occur. In Massachusetts, we have a really robust mediation program.

In New Jersey, how many mediations would you have?

Esther Canty-Barnes: For the period from 2011–12, there were over 600 mediations filed.[97] But in New Jersey also, the mediators are limited to a one-year time frame. They cannot settle anything over one year.[98] So if a parent wanted more than just one year of compensatory education, they would then have the matter transmitted to the Office of Administrative Law to go before an administrative judge who would then convert the settlement into an order. For me, that's one of the top issues. Not that mediation is not a successful tool, but that the parents are limited to that one-year period of time. And it doesn't bode well for a parent who is seeking more than just one year of compensatory education or relief.

Speaker: The other states have these 3 to 700 mediations a year?

Cathy Skidmore: I do not have a number in Pennsylvania, but it's much lower than the due process requests[99].

Dean Hill Rivkin: Twenty-two of the twenty-six mediations in the 12-13 school year resulted in the most frequently mediated issues, which are special education services placement and eligibility.

Erin Archerd: Were there any more questions from the audience?

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[97] http://www.directionservice.org/cadre/pdf/NJ–JAN2014.pdf.

[98] N.J.A.C. § 6A: 14–2.6 (d)(6).

[99] During the 2012-13 fiscal year, Pennsylvania's Office for Dispute Resolution received 403 requests for mediation, and held 188 mediation sessions. A significant number of requested mediations were not held because the parties settled without the need for mediation. See ODR 2012–13 Annual Report, *available at* http://odr-pa.org/annual-report/ (last visited Apr. 6, 2014).

Philip Moses: Hi. I am Associate Director of CADRE, The National Center on Dispute Resolution in Special Education. I will be speaking tomorrow. Hopefully everybody can join us.

Nationally, this is true state by state, in virtually every state, the vast majority of due process complaints are resolved without a hearing. Certainly one perspective is that's not all that different from the court system either. The vast majority of criminal disputes are resolved through plea-bargaining.

I understand some due process complaints are resolved in mediation and some are resolved in resolution meetings. But for us, for us the question we ask states is the most policy "unknown", is that most of the complaints are resolved without a hearing, but how?

Cathy Skidmore: Speaking as a hearing officer, we usually don't know why. We are typically just told that the case has settled and there is no need to proceed with a hearing. We may learn that the agreement occurred during mediation or during a resolution meeting, but more frequently it appears that the settlement takes place outside of these available forums for resolving the dispute.

Mark Weber: Based on my experience in dealing with hearings and talking with lawyers who do them, there really is something to the idea of negotiation in the shadow of the law. People do predict what hearing outcomes would be, and they act accordingly.

Of course, timing factors matter dramatically as do money factors. Often someone will settle cheap because of the need to resolve a matter quickly. But I do detect people looking to see what actually would happen at a hearing.

Esther Canty-Barnes: Sometimes it depends upon which judge you get. And if you get the luck of the draw, that might be an incentive for you to resolve the case. But many times, time is an issue in New Jersey. Because the hearing dates are so far apart, the attorneys cannot stop talking. If you stop talking, then your client is not really being effectively represented. Many of the cases in New Jersey are dismissed or withdrawn because the parties settle the matter before the scheduled hearing dates or the District takes measures that resolve the matter.

When I look at our stats, I think that's the reason that many of them are dismissed or withdrawn. The only reason that they would proceed to a judge is to have that settlement reduced to an order from the court so that if they do want to get it enforced it would not be a difficult thing to do or if the matter is proceeding to a hearing.

Dean Hill Rivkin: Do you have statistics on the number of parents who proceed to due process *pro se*? Who either file or actually try the case themselves?

Philip Moses: We don't have data that breaks down at that level. I will share data tomorrow nationally.

Ruth Colker: I actually wanted to make one point about the settlement. We obviously don't know what the content of settlements are. That's the big unknown. Are they settled satisfactorily for students or just settled because the parent can't afford to continue without a lawyer

But one thing I found was in investigating California, which I thought I mentioned, California, when I read the decisions from last year, one new type of case I saw that I hadn't seen previous years was a case where there was a settlement. In the settlement, the parents had agreed that the private school that the child was going to, that the public school district was paying for, would not be the child's stay put order. They would consent even though the child was in that private placement, that the private placement would not be the stay put—that would not necessarily continue to be the child's educational placement after a year.

But in fact the school litigated the next year the issue of the placement. I talked to some lawyers who were involved in these cases, and they said that was a nonnegotiable position of the school district. The school district may have taken that position—we can't win on challenging the private placement now—but we could win in a year's time if we accept this temporary settlement now.

So that troubled me that parents may have been coming to an agreement that in short term seems like a good decision but wasn't a good long-term decision.

Speaker: I challenge why that is troubling. We do that all the time. That is absolutely standard practice.

Speaker: That's a standard clause.

Speaker: I don't find it troubling. Because that's exactly what's going on. The school—think about it, a student who is transitioning from middle school to high school. They don't have a language-based program at the middle school. The child is entering 8th grade. They just don't have the program. They don't have the cohort of peers. They know at the high school, they have a perfect program, what they consider to be a perfect program for that student.

We entered into a settlement agreement, one-year deal. Everybody walks away with something.

Speaker: You are not waiving the right to challenge at another hearing. I mean, that's like standard boilerplate.

Michael Gregory: I can speak to this. We encounter these clauses in our practice in Massachusetts. One factor that makes a big difference is whether or not a parent will continue to have representation. The clients we represent

do not know for sure that they are going to have an attorney the next year if the school district seeks to change their child's placement. We have such a limited capacity to represent parents that it is hard for us to promise this. I think these clauses are an example of one of those issues that affects parents differently depending on their access to legal representation.

Speaker: We try to mitigate that by saying, okay, so what we are going to do is plan to get to hearing prior to the start of the next school year in the event of a dispute. They set up the IEP team, and prior to the start of the next school year, the decision of the hearing officer, and then you don't have that lag time where the parent. We do try to mitigate it.

Ruth Colker: The cases were for autism, young children with autism. They were going to a nonpublic placement for a year. And then because there was no stay put clause in the settlement agreement, the child transferred back to the public school because—

Speaker: Oh, wait. I think we are talking about something different. Okay, if in the cases I am talking with, the public school is proposing a public placement. The parent wants a private placement. The public school says we will settle for one year. That's completely different what you are saying, the school places the kid in a private school?

Ruth Colker: That's right.

Esther Canty-Barnes: The other problem with this, is usually they enter into an agreement for the one year. They waive several years of compensatory education for that placement. One year is the only thing that they get out of the bargain.

Speaker: It's completely different with different schools for a student with an IEP for a private placement. I have never heard of that.

Erin Archerd: And you were talking about mediation specifically in that case?

Ruth Colker: I was talking about a settlement. I wasn't talking about an IEP. These were not necessarily represented parents at the time that they came to the settlement. Often pro se voluntary, and then the parent thought it was for more than one year, that this is going to be the understanding and then they were very surprised when it was not. The child is put back in the public school during the course of the litigation which can be delayed, protracted, it's a loss no matter what happens.

Children with autism, changes in school placements occurring rapidly without transition planning. When I read those cases, which is a handful of cases, these are obviously examples. It's hard to prove much from an isolated example.

When I read those kind of cases, I also wonder what is the climate of the settlement as a result of mediation? Are they good settlements in the interest

of the child? If parents are not represented by counsel, they take the best deal they can get. But there is no way we will know. We only learn of them when the parent is later unhappy and obtains an attorney.

Speaker: I was talking about settlement conferences where both parties are represented. So that's different. I'm sorry.

Erin Archerd: And that is an interesting feature of the Massachusetts system that I'm not familiar with in a lot of other states, the idea of the settlement conference. Can you explain more about that?

Reece Erlichman: I will tomorrow.

Michael Gregory: It is a process where, in most cases, Reece Erlichman, the director of the BSEA, facilitates a negotiation between the parties. Unlike mediation, she will review documentary evidence and let the parties know what her case assessment is. It is a voluntary, confidential process.

Erin Archerd: Are you issuing an opinion, take it or leave it?

Reece Erlichman: No.

Erin Archerd: Just advisement. You mentioned evaluative conciliation.

Cathy Skidmore: We do an evaluative conciliation in Pennsylvania that sounds very similar to what is done in Massachusetts.

Erin Archerd: Are these the hearing officers, not the mediators, doing this?

Reece Erlichman: Actually, now I am primarily doing it. I would like to have other people do it.

Cathy Skidmore: We are using a mediator currently to conduct the conferences who was a hearing officer before. She has hearing officer experience.

Dean Hill Rivkin: To get back to the question of why so many cases: Mark talked about bargaining in the shadow of the law. There's also very crudely, this phenomenon, the school system and lawyers are able to play for rules. Everybody else, pretty much is a one-shot player. The special education lawyers, the dedicated special education lawyers, are few and far between and are not always familiar with the system.

Settlements look good, a little bit of attorney's fees doesn't hurt at that stage, and the case gets settled. Or for the parents, the deal looks good when they are facing motions or proof or the unknown of what a hearing is all about. I don't know whether that holds up: when you see an issue that you feel that you can litigate in due process and get a precedent that helps your clients, you'll play hard. When that's not at stake, you'll seek a settlement that satisfies in a sense.

Robert Dinerstein: The other thing, the resources of the parents, indigent or not. In my experience in our clinic, our clients have to deal with a

lot of issues, only one of which is the special education of one of their children.

We have clients with three kids in the special education system and they are having a hard time getting through that. If they have come up with something that looks good in the short term, they may take it because that's the way their lives are. They don't have the flexibility and resources, both emotional and financial, to be able to hold out for a better resolution. Again, what representation does, is to, if not even the playing field, make it a little less uneven.

To go back to what Dean said, we have had a lot of success in our cases because we go to IEP meetings, because we have looked at the evaluation and looked at regulations. At some point we might say, we are not sure we want to play—our clients say, I don't want to go that route.

Maybe it's because the client has some ongoing relationship with the teacher, with the principal, where they might do less well because in the longer view they feel they might do better. It's a very—this is a conversation we have with our students all the time. For you as a student representing a client in this matter, you are all excited for the first case. For the client, it may be no more important than that they might be losing their housing, or can't feed the family or have another family member involved in the criminal justice system. It's one of the reasons why clinic cases are so complex and interesting because there is so much going on.

Mark Weber: Just one little tidbit. When I was doing a clinical practice, the special education clients had the highest no-show rate of any area of practice in the clinic. I think it's the same phenomenon. It's too much going on in people's lives. Education gets pushed to a lower priority.

Erin Archerd: One theme I heard several people talk about is the role of the litigation insurance in the background impacting the decisions that school districts are making on this. Does anybody have any more thoughts on that? It's an interesting concept that I have not heard a lot about before.

Esther Canty-Barnes: New Jersey is a state that does use it extensively. The New Jersey bar of school district practitioners is large for such a small state. So it's something that I didn't hear of when I first started doing these cases. Then, school districts were afraid to litigate these cases. But now they are not because they do have litigation insurance that covers these attorneys' fees.

Speaker: Does it cover attorney fees, too?

Esther Canty-Barnes: Attorney fees. The school district may have an attorney on staff or a private firm that represents it in everything. But once the case is commenced, another outside attorney is hired. Districts then

submit the matter to the insurance carrier. The insurance carrier chooses an attorney to represent the school district.

Speaker: Does it prevail?

Esther Canty-Barnes: Doesn't matter.

Speaker: Does it cover parents' attorney fees?

Esther Canty-Barnes: I don't know the answer to that question.

Speaker: Does the attorney for the insurance carrier who doesn't have experience in special ed. law?

Esther Canty-Barnes: No, they know who the players are. They are usually seasoned Special Education pracitioners.

Dean Hill Rivkin: Our little experience is we like those cases because the insurance folks are used to settling cases. They are used to looking ahead and seeing how much the attorney will charge them and what have you.

There's a calculus there that very often doesn't exist when a school system hires a private firm that that firm comes in the first month and bills them $25,000 for reviewing records, doing basic tasks, and interviewing everybody. By that time, those costs are there and the case escalates. I think on the whole it could be very possible.

Erin Archerd: Possibly more open to litigation because of this, but also more open to settlement at the same time?

Dean Hill Rivkin: Little experience, not much.

Erin Archerd: I was really interested in how negative a reaction it sounded like most people were having to resolution sessions, which are a relatively recent innovation under the IDEA2004 authorization. They added in this resolution session. It sounded pretty universally unpopular on this panel.

Esther Canty-Barnes: In the stats that I looked at, there were only 20 resolution meetings, and 17 settled in 2011–2012.

So out of 688 cases that were filed—no, 800 for due process, that's a very small number. I think that school districts want to have their attorney present at those meetings. And by that time, things have gotten so bad between the school district and the parent that they can't see the value of coming together yet again for a meeting.

Erin Archerd: That's a good point. Structurally with these resolution meetings, neither side is allowed to bring an attorney if the parent doesn't bring an attorney. That's one of the factors.

Speaker: I have had an interesting twist in resolution meetings. Most of the clients don't want to waive resolution meetings because they think it's useless. It's gone on for a period of time. Then the parent makes a decision to unilaterally place and then they file a hearing request.

My client says I want to do a resolution meeting because I am convinced I can convince the parents who just unilaterally placed for a public school. I said there is no way that's ever going to happen. That is impossible. There's no way. Sometimes I counsel my school clients once the unilateral placement has been made and the child has got there and you met it financially, there is no way that child is coming back. We will either go to due process or settle the case. I encourage them to have a little reality check.

Speaker: I had one client who insisted on having a resolution meeting, who put me in a difficult position with the parents' attorney. I had to let them know that it wasn't a complete waste of time that my client's intention was to convince them to come back. No, they are not doing it. It put me in a difficult situation.

Erin Archerd: Comment in the back? I want to make sure I understood—that the district has an obligation to hold the resolution session and they can't waive it, that it would have to be the parent waiving the meeting. So if as a parent I go without an attorney, the district can't bring an attorney, so why aren't there more? Something is missing there.

Michael Gregory: I think it's the opposite.

Speaker: The statute says that. It also says it if they fail to do it within so many days . . . it's considered waived.

Esther Canty-Barnes: New Jersey's administrative code provides that you could also have a mediation in lieu of the resolution meeting or a resolution meeting. So one or the other.

Speaker: Right. In the school doesn't want to do it. Even if the school does want to do it, it lowers the timeline. Then the parents begin due process, if it's over the 15-day.

Speaker: No penalty or anything, no consequence for the district?

Esther Canty-Barnes: No, none.

Speaker: But the intent was to give the school opportunity to get this done.

Michael Gregory: One other factor that sort of works against the resolution session, at least in Massachusetts, is that discovery cannot be filed until after it is held or waived. At that early point in the process there is still so much information that has not been exchanged, many cases are not ready to be resolved yet.

Speaker: You are assuming, again, that's peculiar in Massachusetts. Most jurisdictions don't have discovery in due process.

Esther Canty-Barnes: Oh, yes, we do.

Speaker: How come this is not uniform? Some of those things just need to be uniform.

Esther Canty-Barnes: In Jersey, discovery starts automatically. If an attorney requests documents, you are obligated to do provide it.

Speaker: I meant discovery in the sense of interrogatory and depositions.

Esther Canty-Barnes: There is an informal discovery process in New Jersey and there are administrative rules. However we cannot use interrogatories or depositions.

Erin Archerd: One thing that's coming out, that we haven't even touched on is, if we asked you each what were the sort of rules that govern your particular due process hearing, are there evidentiary guidelines, it sounds like Cathy at least, your office is putting out some rules for the parties?

Cathy Skidmore: We did create so-called hearing directions. They are always subject to change, especially by the hearing officer using his or her discretion, as the directions state. But we have been successful. Other than that, we don't have any one particular set of rules that govern.

Robert Dinerstein: In D.C., according to the monitor in the *Jones* litigation we talked about earlier, DC waived the resolution session in 3 percent of the claims filed. They always want it, plaintiff attorneys always don't. They have to go to the resolution session once the District asks for it. They go in there, the representative says to the parent "Can you tell us what your concerns are?" at which point the parent's attorney says, "I already told you our concerns and they are in the complaint.

Our response is, we have nothing to say. It's a kind of Kabuki Theatre dance that goes on. The monitor asked attorneys for the District whether they thought this process was a good one. One attorney who is at many of these meetings said, "We think it's good because it shows the parents that we are working on the problem" which I would say is probably not what the parents are thinking. I think it's a time-waster I think in that case. From my standpoint when there is opportunity to do mediation, I always want to take advantage of it. Maybe we will get into this more tomorrow.

What I see not only in special ed. cases but in some other cases as well is that mediation offers the opportunity for the client to speak to a neutral party and tell him or her what is going on in the matter. If the client has a representative there to protect his or her interests, it can be an empowering process, especially for clients who themselves have disabilities and have a difficult time getting someone to listen respectfully to them. That's something I really want to take advantage of. Mediators can be very useful.

Speaker: I am talking about the resolution session. I am an attorney and practice in Ohio. I work for a school district. I will try to withhold my comments a lot today. I wouldn't say Ohio is the Wild West. I am thinking, the Land of Oz.

You know, in my experience, resolution sessions work. And sometimes it's because finally the parents are in front of a decisionmaker. And they are going to work it out. They are being heard. That's some of the reports I get.

Sometimes, yeah, it's a waste of time. But sometimes it's a way to not condition the parties to say, let's go to the lawyers to try to resolve something that could have easily been resolved by getting a decision-maker in the room.

I give credit to the people who mediate. Maybe that's why we have such a low hearing rate. I am getting a benefit from hearing stories about other states thinking Ohio is not too bad. There are folks here in Ohio that represent parents.

A lot of times we share the same meetings. To me, resolution sessions have been, I think, a great way not to stall the process.

Robert Dinerstein: You said something important. You said you have had the meeting with the head of special education. One of the complaints in our system is that no one was there with any authority. They don't necessarily know the issues and are not empowered to resolve them. If that were possible, there would be a more positive response.

Erin Archerd: Do any of the parents' attorneys from Ohio want to comment?

Speaker: I do lot of mediations and should ask to do those more than resolution sessions. Just because I find there has been a lot of talk back and forth. I think it helps because the parent has filed a complaint, so they have been given a little more information on what they want, I hope.

Mediation, in my point of view, is more workable. I have seen resolutions where we have been able to resolve some things. It's a little early in the process. That sometimes is a problem. I think you got to set the stage and get some of that talking going on. Mediation sometimes is better. But I don't turn down resolution sessions, I say let's do it. We can actually make it work. But I have had better luck with mediation.

Speaker: It also is helpful to say we have to do this within the next 15 days. I think is helpful because and sometimes when there is a representation on both sides, we can get it done without waiting for mediator.

Speaker: A lot of times the school comes in with options that weren't raised before, so sometimes it can get resolved.

Erin Archerd: It seems like some concerns about the incentives for mediation were if the parent doesn't bring an attorney to school, [the schools] can bring an attorney and so the parents go in without an attorney.

Speaker: We see some agreements after they sign them, and it's not great.

Tiffany Kell[100]: I am from Arkansas. Just to throw a little I guess problem here. We don't have attorneys in mediations. They are not allowed. But we have more mediations than we have due process hearings and more facilitated IEP's than we do anything. There is about a 95 percent agreement rate in mediations. Earlier our whole thought process, we talk to schools, teachers, local education agencies, parents, all advocacy groups, trying to get advocacy with mediation and to encourage preparation planning and to be their own advocate for their children. It's very grassroots.

Mark Weber: I heard negative things about facilitated IEP's from someone who did an Indiana practice. The claim was that people doing the facilitation were often retired administrators and the lawyer felt they were not as creative as a mediator sometimes would be in working out solutions. Who are the folks doing the IEP facilitation?

Tiffany Kell: The mediators. It's all administered through the law school. So then we have student observers. That's how we do it.

Erin Archerd: That might be an idea for us to incorporate here in Ohio.

Philip Moses: I'll talk more about IEP facilitation tomorrow. Nationally, about 26 percent of resolution meetings arrive at an agreement. A handful of states, small handful of states provide facilitators for resolution meetings. And the states that do that, their agreement rate is about 50 percent. So they will agree there is a role for third party helpers. I think a resolution meeting is a process that's much better served when a third party facilitator can be made available.

Speaker: How does it differ from a mediation at that point?

Philip Moses: Well, there are some legal differences because you can rescind a resolution meeting agreement and you cannot rescind a mediation agreement.

Speaker: You mean the three-day thing?

Philip Moses: Yes. There are some differences—you are asking some process questions. But one of the things we make it clear is if you are providing a facilitator at a resolution meeting, you want to be really clear if they are going to mediation, the participants need to be clear they left the resolution meeting process and they are now in the mediation process.

Speaker: In Ohio, the mediators do facilitations. The big differences are the people in the room. Facilitations have the whole IEP team, we are talking about speech and OT [occupational therapy]. With a mediation, it's the lawyers and Special Education Director. It's much less about the nitty-gritty of the services.

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[100] Mediation Program Coordinator, University of Arkansas at Little Rock.

Ruth Colker: If I could make one more point, Perry mentioned before all the different kinds of processes. In Ohio, when I read the complaint resolution process decision, it also often will say that the school district and the parents should have a facilitated IEP meeting. That would be the next step in the decision in which the investigator recommends a new IEP. Please contact so and so of the state and assign someone to facilitate an IEP meeting. That's a nice creative process, so we know there is going to be an IEP to be implemented. Someone from the state can facilitate the IEP meeting. I haven't participated in that process, but that could be another step in getting resolution without due process and using more resources that the right people are in the room and have an intelligent discussion. I don't know if other states do that. That's a real trend I am seeing in Ohio.

Erin Archerd: We are down to our final few minutes. I wanted to open it up to the panelists. Were there any questions you wanted to ask your fellow panelists or members of the audience?

Dean Hill Rivkin: I want to go back to a question. Aside from feasibility, I am trying to weigh a federalized system of due process or dispute resolution, whatever you want to call it, which on balance is superior to you have to preempt the state administrative procedures, which are different.

Maybe it's never going to happen. Congress is never going to say, "You can't use your administrative procedures at Tennessee or Illinois or wherever. You have this set of procedures." Again, it's feasibility, I guess. I just don't see it happening. Is it in the abstract a good idea?

Eloise Pasachoff: That's what I want to know.

Dean Hill Rivkin: Probably. People who move from state to state, lawyers, would become more comfortable with a common system. They might be able to move from state to state, which now is hard because of the differences in rules and that stuff.

Mark Weber: I wouldn't ignore the nationalizing effects of the fact that some hearing officers work for more than one state. There could be a gradual federalization. But in general, I think the states will want to hire their own people, have their own control over things.

Erin Archerd: I would like to thank all of our panelists and our very engaged audience this afternoon.