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SETTLING INDIVIDUALS WITH DISABILITIES EDUCATION ACT CASES: MAKING UP IS HARD TO DO

*Mark C. Weber**

The Individuals with Disabilities Education Act (IDEA) entitles children with disabilities to a free, appropriate public education. As part of this entitlement, parents of a child with disabilities have the right to challenge the services provided by their child's school in administrative proceedings and in court. Like most other legal disputes, most IDEA cases settle. But settling an IDEA case entails unique issues—and unique pitfalls—that make the task even more challenging than the settlement of other cases. IDEA has a statutory mediation provision with extensive requirements and a one-of-a-kind prehearing settlement device called the “resolution session” with its own set of rules. It has an administrative offer-of-settlement provision whose interpretation is open to debate. Jurisdiction under IDEA for actions to enforce settlement agreements remains uncertain, and exhaustion defenses may, or may not, bar such actions. Parents who prevail in IDEA disputes may be awarded attorneys' fees, but that entitlement may not apply when the case is settled. This Article describes the law of settlement of IDEA disputes, highlighting the areas of uncertainty. It offers modest steps to reform the law, suggesting a clarification of federal jurisdiction, a bypass of exhaustion in settlement enforcement actions, and greater legislative guidance on what forms of settlement may support fees.

INTRODUCTION

Like most other legal disputes, most cases brought under the Individuals with Disabilities Education Act¹ (IDEA) settle.² But even

* Vincent dePaul Professor of Law, DePaul University. Thanks to Ben Johnson and Elizabeth Graham for their research assistance, and to participants in workshops at the University of Southern Maine and Virginia Commonwealth University. Special thanks to Paul Secunda for his comments on the manuscript.

1. 20 U.S.C. §§ 1400–1482 (2006).

2. Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 353 & n.120 (2001) (citing data from New York State). Regarding cases outside the special education context, see Michael J.

though IDEA, the federal law governing special education, has been around since the 1970s, litigants are still without clear guidance about how the mechanisms of settlement should work, what the settlement agreement ought to look like, and what to do if either side of the dispute fails to live up to its agreement.³

Existing legal literature largely neglects the law that governs the settlement of IDEA cases. A number of useful articles describe the statute's dispute resolution processes,⁴ and some articles contain valuable discussions of the benefits and drawbacks of special education case mediation,⁵ but the actual law controlling special education settlement remains an under-studied field.

This should come as no surprise. For all the time and effort that practicing lawyers devote to settling cases, the law of settlement occupies little of the legal literature⁶ and less of the law school curriculum. Students may be exposed to offers of judgment⁷ in Civil

Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1212–14 (1992) (collecting and analyzing studies of civil case dispositions).

3. In the past five years, there have been four Supreme Court cases interpreting the statute, but none concerning settlement. See *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (permitting claim for tuition reimbursement for private schooling of child found ineligible for services by public school); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (finding that parents may file IDEA appeals in court pro se); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (disallowing expert witness costs as part of attorneys' fees for prevailing parents); *Schaffer v. Weast*, 546 U.S. 49 (2005) (placing burden of proof at administrative hearing on party challenging educational program).

4. E.g., Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L.J. 65 (2007); Demetra Edwards, Note, *New Amendments to Resolving Special Education Disputes: Any Good IDEAs?*, 5 PEPP. DISP. RESOL. L.J. 137 (2005).

5. E.g., Steven S. Goldberg & Dixie Snow Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. LAW REP. 703 (1995); Marchese, *supra* note 2, at 361–65.

6. The most celebrated law review article about settlement pays attention not to the law of settlement, but rather to the social effects of settlement as a pervasive practice and the ideology behind support for agreed solutions. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Nevertheless, there are exceptions to the generalization in the text, notably the work of Professor Parness, see, e.g., Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33 (2003); Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 U. KAN. L. REV. 347 (2002); and that of Professor Korobkin, see, e.g., Russell B. Korobkin, *The Role of Law in Settlement*, in THE HANDBOOK OF DISPUTE RESOLUTION 254 (Michael L. Moffit & Robert C. Bordone eds., 2005); Russell B. Korobkin et al., *The Law of Bargaining*, 87 MARQ. L. REV. 839 (2004).

7. See FED. R. CIV. P. 68 (establishing offer-of-judgment procedure).

Procedure, learn about consent decrees⁸ in Remedies, and absorb some lessons about the limits of conduct connected with settlement in Professional Responsibility.⁹ But the portion of the law school curriculum that deals most directly with settlement focuses on skills: courses such as Mediation or Negotiation Strategy are designed more to initiate students in the techniques of reaching mutually advantageous agreements than to train them in the legal framework that governs the formation and enforcement of a settlement in a civil case.¹⁰ It is a commonplace that settlements are contracts and are construed accordingly.¹¹ But they are highly specialized contracts, ones that the law treats in a particularized fashion that students learn little about in law school.

8. The Federal Rules of Civil Procedure do not treat consent decrees differently from other injunctions. See FED. R. CIV. P. 65 (covering injunctions). Rule 23(e) covers settlements in class actions, a topic that students may study in a second-semester Civil Procedure or Complex Litigation course. FED. R. CIV. P. 23(e) (covering settlement, voluntary dismissal, or compromise of class actions). Rule 41(a)(1) covers stipulation for voluntary dismissal, a typical mechanism for disposition of settled cases, particularly cases for damages. FED. R. CIV. P. 41(a)(1).

9. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) (requiring lawyer to defer to client's decision whether to settle); R. 1.8(g) (generally prohibiting aggregate settlements); R. 1.8(h) (generally forbidding settlement of claim between lawyer and client in absence of independent representation for client); R. 5.6(b) (generally prohibiting settlements that restrict lawyer's right to practice); see also *Evans v. Jeff D.*, 475 U.S. 717, 738, 744 (1986) (finding no barrier in professional ethics rules or federal law to defendants' conditioning of settlement on plaintiffs' waiver of civil rights attorneys' fees). There are a few other instances of coverage of settlement in law school classes, but what is striking is how scarce and disjointed the coverage is. Among the examples are the exclusion of evidence of compromise and offers to compromise, a topic that receives perhaps half a class hour of coverage in Evidence, see generally FED. R. EVID. 408 (barring compromises and offers to compromise); legal malpractice for settling too cheaply, which takes up a few minutes in Torts, see generally *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195 (Conn. 1994) (upholding action against attorney for inducing client to settle); and attorneys' fees for settlements and validity of release-dismissal agreements, which might receive a little class time in Civil Rights or Federal Courts, see generally *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (forbidding fees award when suit induced legislative change that mooted case); *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (upholding release-dismissal agreement). Federal jurisdiction to enforce settlements may receive a mention in Civil Procedure or Federal Courts. See generally *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) (finding no enforcement jurisdiction unless reserved).

10. See, e.g., Katheryn M. Dutenhaver, *Dispute Resolution and Its Purpose in the Curriculum of DePaul University College of Law*, 50 FLA. L. REV. 719 (1998) (describing Dispute Resolution curricula). See generally LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* (4th ed. 2009) (text for law school courses on Dispute Resolution).

11. See Daniel Blegen, *Oral Settlement Agreements: Just What Did I Agree To?*, 55 J. MO. B. 95, 95 & n.2 (1999) (collecting Missouri authority); Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 9 (1996). Settlement agreements as such receive scant attention in the typical Contracts course, however.

Settling an IDEA case entails unique issues—and unique pitfalls—that make the task even more challenging than the settlement of other cases. IDEA has a statutory mediation provision with extensive requirements¹² and a one-of-a-kind prehearing settlement device, termed the “resolution session,” with its own peculiar characteristics.¹³ Special education settlement agreements may be vulnerable to attack on the ground that they undermine the statutory purpose of IDEA. Jurisdiction under IDEA for actions to enforce settlements is uncertain, and exhaustion defenses may, or may not, bar the action. There is an administrative offer-of-settlement provision¹⁴ whose interpretation is open to debate, and parents who prevail in special education disputes have an entitlement to attorneys’ fees that may, or may not, apply when a case is settled.¹⁵

This Article aims to provide a comprehensive description of the current law of settlement for IDEA disputes. It delves into the mediation and dispute resolution processes, discussing what can be mediated and what rules apply. It notes the courts’ general practice of enforcing settlement agreements as written, despite arguments that departures from settlement terms might be justified under the statute. It marshals the arguments and discusses the caselaw with regard to the courts’ jurisdiction to enforce settlement agreements and the administrative exhaustion defense. It describes the offer-of-settlement rule, makes note of its operation, and discusses its interaction with the attorneys’ fees provision. It takes up attorneys’ fees for settlements, discussing the circumstances under which attorneys’ fees might be available to parents who reach compromises in IDEA cases. Although this Article is intended primarily to be descriptive, it builds an evaluation from its descriptive sections and puts forward some steps for reforming the law of IDEA case settlement: a clarification of federal jurisdiction for special education settlement enforcement, a bypassing of exhaustion for civil actions enforcing settlements, and greater guidance as to what forms of settlement may support fees.

12. 20 U.S.C. § 1415(e) (2006).

13. § 1415(f)(1)(B).

14. § 1415(i)(3)(D)(i).

15. § 1415(i)(3).

Part I of this Article is a brief introduction to the legal framework established by IDEA for education of students with disabilities and resolution of disputes that arise under the law. In Part II, the Article turns to the legal issues involved in settling special education cases, discussing the dispute resolution session and mediation. Part III covers the broad topic of settlement enforcement, including how settlement agreements should be interpreted and courts' jurisdiction to enforce agreements, as well as the administrative exhaustion defense. Part IV moves from that topic to offers of settlement and the impact of offer-of-settlement practice on attorneys' fees awards. Part V considers the legal forms of settlement, asking when, if ever, a settlement may take a form such that attorneys' fees may be awarded to prevailing parents on the basis of the agreement. Part VI discusses proposals for reforming the law of settlement with regard to enforcement jurisdiction, the exhaustion defense, offers of settlement, and entitlement to fees.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The Individuals with Disabilities Education Act (IDEA) requires states that accept federal special education funding to provide free, appropriate public education to all children with disabilities within their jurisdiction.¹⁶ States and local school districts assume not only the duty to provide an appropriate education to these children, but also the obligation to furnish services related to education, such as transportation, physical and occupational therapy, and sign language interpretation.¹⁷ Children with disabilities must be educated, to the maximum extent appropriate, in inclusive settings, and supplementary aids and services must be furnished to avoid the need for removal of children from regular classes.¹⁸

Under IDEA, parents of a child with disabilities have rights to participate in the creation of the written program that sets out the services to be delivered to their child.¹⁹ These rights include the ability to challenge the services or placement the school offers, as

16. *See* 20 U.S.C. § 1411(i) (2006) (authorizing appropriations).

17. *See id.* § 1401(26) (defining "related services").

18. *Id.* § 1412(a)(5).

19. *See id.* § 1414(d) (requiring opportunity for parental participation in devising individualized education program).

well as other aspects of the provision or denial of education to the child, by demanding an adversarial “due process” hearing; both the parents and the school district may appeal the result of the hearing to court.²⁰ The procedural mechanisms guarantee that the law is enforced in each individual case and that decision making by schools is transparent. These procedures were critical features of the 1975 Education for All Handicapped Children Act, the statute that is now IDEA; they demonstrate a “congressional emphasis” on participation rights and procedural regularity.²¹ Two federal cases strongly influenced Congress in its drafting of the law; both upheld procedural due process claims against exclusion from public school without notice and the opportunity for an adversarial hearing.²²

When Congress enacted amendments to the Education for All Handicapped Children Act in 1990, it renamed the law the Individuals with Disabilities Education Act.²³ The original law²⁴ was the result of years of effort to create a legally enforceable personal entitlement to appropriate public schooling for all children who meet a disability standard and need special education.²⁵ Although some states and localities had been educating children with disabilities and receiving limited federal special education funding to support their efforts, at the time of the law’s passage 1.75 million children with

20. *Id.* § 1415(f)–(i). The child remains in the existing placement during the pendency of proceedings. § 1415(j). Attorneys’ fees are available to parents if they are successful. *Id.* § 1415(i)(3)(B)–(F). The law also provides rights to challenge long-term suspensions, expulsions, or other removals from school imposed on children with disabilities. § 1415(k).

21. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982); *see also id.* at 205 (“Congress placed . . . emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . .”).

22. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass’n for Retarded Children v. Pennsylvania (P.A.R.C.)*, 343 F. Supp. 279 (E.D. Pa. 1972), 334 F. Supp. 1257 (E.D. Pa. 1971). The Supreme Court commented on the importance of these cases to the formation of the Education for All Handicapped Children Act in *Rowley*, 458 U.S. at 192–93.

23. Pub. L. No. 101-476, 104 Stat. 1103 (1990). The term “handicapped” had become disfavored, and many in the disabilities rights movement favored placing the noun “person” or “individual” first and the “with disabilities” modifier later, in order to emphasize that a person with a disability is a human being rather than a manifestation of an impairment. *See* ILL. ATTORNEY GEN., DISABILITY RIGHTS: MANUAL OF STYLE FOR DEPICTING PEOPLE WITH DISABILITIES, <http://www.ag.state.il.us/rights/manual.pdf> (last visited Feb. 25, 2010).

24. Pub. L. No. 94-142, 89 Stat. 773 (1975).

25. *Id.*

disabilities were excluded from public school and 2.5 million were in inadequate programs.²⁶

President George W. Bush signed the latest amendments to IDEA, the Individuals with Disabilities Education Improvement Act (the “Improvement Act”), on December 3, 2004.²⁷ The Improvement Act left the fundamentals of IDEA intact, but added requirements regarding highly qualified teachers, student assessment, and the other features of the No Child Left Behind initiative.²⁸ It also permitted some federal special education funding to be used for intervention services for children not yet determined to have a qualifying disability.²⁹ It changed eligibility determination rules for children with learning disabilities.³⁰ Most significantly for present purposes, it refined and expanded provisions introduced in 1997 to promote alternative dispute resolution, and thus produced the mediation and resolution session provisions described in the next section of this Article.

II. IDEA’S MEDIATION AND RESOLUTION SESSION REQUIREMENTS

Under the present terms of IDEA, mediation must be made available for all matters, including those that occur before the filing of a due process hearing request.³¹ Basic rules with regard to

26. H.R. REP. NO. 94-332, at 11–12 (1975). The special education law came into place against a background of broader federal efforts to end discrimination against persons with disabilities. In 1973, Congress passed section 504 of the Rehabilitation Act, which forbids discrimination against persons with disabilities by recipients of federal funding. 29 U.S.C. § 794 (2006). Since state educational agencies and local school districts receive federal money, section 504 confers the right to nondiscrimination in education on children who have disabilities. The coverage of section 504 is broader than that of IDEA, and accordingly the nondiscrimination law protects some children who do not meet the definition of eligible children found in IDEA, as well as those who do. For a discussion of numerous difficult eligibility issues under IDEA, see Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF L. REV. 83 (2009). In 1990, Congress passed title II of the Americans with Disabilities Act (ADA), which bars discrimination against persons with disabilities by units of state and local government (again including state educational agencies and local school districts), creating yet another remedy for disability discrimination in education. See 42 U.S.C. §§ 12131–12150.

27. Acts Approved by the President, 40 WEEKLY COMP. PRES. DOC. 2936 (Dec. 13, 2004). See generally Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7 (2006) (describing and evaluating 2004 amendments).

28. See, e.g., 20 U.S.C. §§ 1401(10)(B) (defining highly qualified teachers), 1412(a)(16) (governing participation in assessments by children with disabilities) (2006).

29. *Id.* § 1413(f).

30. *Id.* § 1414(b)(6)(A).

31. *Id.* § 1415(e)(1).

mediation include the following: (1) it must be voluntary; (2) it must not be used to delay or deny a parent's right to a hearing or any other rights; (3) it must be conducted by a qualified, trained, and impartial mediator; (4) the state has to bear the cost; (5) scheduling must be timely and convenient to the parties; (6) a written agreement that is reached at mediation must be signed by both the parent and a representative of the school district who has binding authority, and it is enforceable in court; and (7) mediation discussions, even if an agreement is not reached, are confidential and may not be used as evidence in a due process proceeding or civil litigation.³² Parents involved in mediation must also be afforded an opportunity to meet with a disinterested party affiliated either with a parent training and information or community parent resource center, or with an appropriate dispute resolution entity.³³ The state has to maintain a list of qualified mediators.³⁴

Seven years ago, special education mediation was the subject of a General Accounting Office study.³⁵ The study found that state officials have an extremely positive view of the special education mediation process.³⁶ Various other reports on mediation are also highly favorable.³⁷ A major advantage to mediation over litigation is that when the parties to a dispute are together with a skilled mediator, they might think of solutions to the dispute that meet their respective interests but may be something other than what a hearing officer might order.³⁸ Criticism of the current system of special

32. § 1415(e)(2). See generally Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001) (suggesting balanced approach to disclosure of mediation communications).

33. 20 U.S.C. § 1415(e)(2)(B) (2006).

34. § 1415(e)(2)(C).

35. U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS (2003).

36. *Id.* at 18. The opinion may be related to the procedure's cost savings. The report noted that in one state, the cost of using a mediator was about one-tenth that of using a hearing officer. *Id.* at 3. Another state had a figure of one-ninth. See *id.*

37. E.g., Damon Huss, Comment, *Balancing Acts: Dispute Resolution in U.S. and English Special Education Law*, 25 LOY. L.A. INT'L & COM. L. REV. 347, 359 (2003) ("The mediation provision's design . . . nurtures and protects positive relationships between parents and the educational authorities.").

38. See Paul M. Secunda, *Mediating the Special Education Front Lines in Mississippi*, 76 UMKC L. REV. 823, 825–28 (2008) (discussing successful resolution of special education dispute for teen in adult prison); see also Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 869 (2008)

education mediation centers on power disparities between the school district and the parents, particularly when the parents cannot afford a lawyer.³⁹ Some evaluations are mixed or essentially neutral.⁴⁰

The resolution session is to be used in due process cases in which mediation is not, unless the parents and the school district agree in writing to waive the session and go directly to hearing.⁴¹ This session must be convened within fifteen days of the parent's demand for due process, and has to include the parent and relevant members of the Individualized Education Program (IEP) team, including someone with decision-making authority from the school district.⁴² The parents are to discuss their complaint and the facts behind it, and the school district is given the opportunity to resolve the case.⁴³ Unless the parent is accompanied by an attorney, the attorney for the school district is barred from attending.⁴⁴ If agreement is reached, the parties execute a legally binding document, which may be enforced in court;⁴⁵ a party may, however, void the settlement agreement within three business days of when the agreement is signed.⁴⁶ If the parties do not resolve the dispute within thirty days of the receipt of the due process complaint, the applicable timelines for hearings and appeals begin to run again.⁴⁷

(describing position that mediation permits “the parties to work together [so as to] . . . allow a focus on the parties’ real needs and interests, in addition to their legal claims; offer a flexible process customized to fit the parties’ situation, emotions, and interests; and encourage the development of a range of creative and responsive outcomes”).

39. Huss, *supra* note 37, at 361–62; see Marchese, *supra* note 2, at 361–65.

40. Compare Grace E. D’Alo, *Accountability in Special Education Mediation: Many a Slip ‘Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 240–42 (2003) (reporting on basis of study of perceptions among participants in special mediations in Pennsylvania that mediators were more successful in averting due process hearings than in building relationships between parents and schools or accomplishing other goals), with Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 60–61 (1997) (reporting on basis of study of perceptions of fairness among participants in special education mediations in New Jersey, that “[p]articipants in this study generally expressed only mild satisfaction with mediation and perceived it only as a modestly fair procedure,” and further noting concerns about power imbalance when parents lacked attorney representation).

41. 20 U.S.C. § 1415(f)(1)(B)(i)(IV) (2006).

42. § 1415(f)(1)(B)(i)(I)–(II).

43. § 1415(f)(1)(B)(i)(IV).

44. § 1415(f)(1)(B)(i)(III).

45. § 1415(f)(1)(B)(iii).

46. § 1415(f)(1)(B)(iv).

47. § 1415(f)(1)(B)(ii).

Relatively little precedent exists on the specifics of the mediation and resolution procedures, but one prominent decision, *D.D. v. District of Columbia*,⁴⁸ fills out the permissible content of the resolution session by stating that attorneys' fees may be discussed at the session if the parents or counsel believe in good faith that they have an entitlement to fees for work done prior to the session.⁴⁹ The magistrate judge report that this opinion adopts, *Davis v. District of Columbia*,⁵⁰ held that the due process hearing officer erred by dismissing the complaint on the ground that the defendants offered a settlement in full satisfaction of the parent's complaint when the parent did not believe the complaint had been resolved to her satisfaction.⁵¹ The magistrate judge opinion also held that the defendants undermined the parent's right to counsel by refusing at the resolution session to negotiate about the parent's attorneys' fees.⁵² Another case, *Friendship Edison Public Charter School Chamberlain Campus v. Smith*,⁵³ ruled that a hearing officer erred in excluding testimonial and documentary evidence regarding a resolution session, finding that when the evidence was proffered to show that a parent was responsible for the delay in completion of evaluations, Federal Rule of Evidence 408 was inapplicable and no other provision required confidentiality.⁵⁴ *Davis* made a similar determination regarding admissibility of evidence about the resolution session.⁵⁵

The 2002 *Report of the President's Commission on Excellence in Special Education* would have gone even further in promoting alternative dispute resolution than establishing mediation and resolution session procedures. The report proposed voluntary binding

48. 470 F. Supp. 2d 1 (D.D.C. 2007).

49. *Id.* at 2.

50. No. 05-2176 PLF/DAR, 2006 WL 3917779 (D.D.C. Sept. 28, 2006).

51. *Id.* at *7-8.

52. *Id.* at *8-9.

53. 561 F. Supp. 2d 74 (D.D.C. 2008).

54. *Id.* at 80-83. Rule 408 bars the admissibility of evidence of offers of compromise of the claim as well as (except in some criminal cases) conduct or statements made in compromise negotiations when offered to prove liability for, invalidity of, or amount of a claim, or to impeach through a prior inconsistent statement.

55. *Davis*, 2006 WL 3917779, at *6-7.

arbitration before arbitrators specially trained in conflict resolution.⁵⁶ It is unclear that presenting a case before an arbitrator would be any cheaper or quicker than presenting one before a due process hearing officer. An arbitration process would presumably cut off appeals, but as a matter of public policy that may not offer any advantage over a hearing in which the parties retain appellate rights.⁵⁷ In any case, the comprehensive 2004 reauthorization of IDEA, the Improvement Act, did not adopt the Commission's proposal, although the House draft of the reauthorization bill included such a provision and the House Committee's Report commented favorably on it.⁵⁸ The Senate's version of the reauthorization bill did not include arbitration, and the House conferees agreed to recede.⁵⁹

III. INTERPRETING AND ENFORCING SETTLEMENTS

Interpretation and enforcement of settlement agreements can present challenging issues. Interpretation encompasses construction of the agreement itself, public policy considerations with regard to specific terms, and special issues concerning settlement of minors' claims. Enforcement embraces issues of jurisdiction and exhaustion of administrative remedies.

A. Interpretation of Settlements

In general, settlement agreements will be enforced precisely as written. An illustrative case is *Stephen H. v. West Contra Costa County Unified School District Financing Corp.*,⁶⁰ in which parents alleged that their child was struck by at least four different teacher aides over a five-month period and otherwise physically and emotionally abused because of outward manifestations of his

56. PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 40–41 (2002), available at http://www.ed.gov/inits/commissionboards/whspeialeducation/reports/images/pres_rep.pdf.

57. See Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN'S L.J. 1, 16 (2004) ("Binding arbitration is not really an appealing endeavor, and may well lead to a lose-lose situation between home and school."). But see Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. L. REP. 35, 38 (2005) (advocating "the arbitration model of a single-session hearing without judicial appeal with very limited exceptions, the principal one being in cases that present major new legal issues").

58. H.R. REP. NO. 108-77, at 113–14 (2003).

59. H.R. REP. NO. 108-779, at 216 (2004) (Conf. Rep.).

60. No. C 06-06655 TEH, 2007 WL 1557482 (N.D. Cal. May 29, 2007).

learning disability.⁶¹ The court denied a motion to dismiss claims under section 504 of the Rehabilitation Act,⁶² the Americans with Disabilities Act,⁶³ IDEA, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution, when the defendant's motion relied on a settlement agreement previously entered into by the parties.⁶⁴ The agreement released the defendant from liability for all educational claims, but it created an exception for potential claims arising out of interactions with aides.⁶⁵

As *Stephen H.* suggests, settlement agreements in special education disputes are enforced under general principles of contract law. This in turn implies that enforcement may be challenged on the grounds of public policy and unconscionability. Most courts, however, have been unsympathetic to parents' claims that the settlements to which they agreed gave away too much, or that the parents were taken advantage of in the bargaining process.

*D.R. v. East Brunswick Board of Education*⁶⁶ is a prominent case in which the court refused to invalidate a settlement agreement despite an argument that the basic protections that IDEA furnishes to a child had been bargained away.⁶⁷ In *D.R.*, the parents of a child with severe developmental disabilities placed him at a private residential school because of dissatisfaction with his progress in a program offered by the school district.⁶⁸ While their dispute over school district funding for the private school was pending, the parents and the district entered into an agreement in which the district agreed to pay the costs of the private school at a rate of \$27,500 per year for one school year and that amount plus ninety percent of any increase the next year.⁶⁹ The parents agreed that the district would be absolved of any other costs for the placement, related services, or transportation incurred due to the school transfer.⁷⁰ The next year, the tuition increased dramatically, and the

61. *Id.* at *1.

62. 29 U.S.C. § 794 (2006).

63. 42 U.S.C. § 12132 (2006).

64. *Stephen H.*, 2007 WL 1557482, at *2.

65. *Id.*

66. 109 F.3d 896 (3d Cir. 1997).

67. *Id.* The case is criticized in Marchese, *supra* note 2, at 358–61.

68. *D.R.*, 109 F.3d at 898.

69. *Id.* at 899.

70. *Id.*

private school added a charge for the services of two aides.⁷¹ The school district refused to pay any portion of the cost of the aides, contending that the aides' services were a related service that they had not agreed to pay for under the agreement.⁷² The district court ruled that the aides were educationally necessary, so the school district had to fund them; the court reasoned that the settlement was void because the child's circumstances had changed.⁷³

The court of appeals, however, reversed that decision, ruling that the child's circumstances did not change, but rather the only change was that the private school concluded that more help was needed to deal with the child's unchanged condition.⁷⁴ The court refused to void the settlement despite the dissent's argument that enforcing a settlement in which the parents and the school district bargain away a child's fundamental rights undermines the public policy underlying IDEA.⁷⁵ The majority reasoned that permitting a party to void an "unpalatable" agreement would be contrary to the broad federal policy of encouraging settlement.⁷⁶

One court has distinguished *D.R.*, noting that *D.R.* did not consider the situation in which the child's circumstances in fact had changed.⁷⁷ In that case, *E.D. ex rel. Dukes v. Enterprise City Board of Education*, the court enforced a settlement agreement in principal part, though it considered with regard to each breach of the agreement whether the school district had deprived the child of free, appropriate public education by noncompliance.⁷⁸ A Connecticut court dismissed an action for breach of contract and unjust enrichment brought by a school district after parents violated a settlement agreement by requesting a due process hearing before the expiration of the time period set in the agreement.⁷⁹ The court found the barrier to seeking due process to be void as against public

71. *Id.*

72. *Id.*

73. *Id.* at 900.

74. *Id.* at 900-01.

75. *See id.* at 902 (Scirica, J., dissenting).

76. *Id.* at 901 (majority opinion).

77. *E.D. ex rel. Dukes v. Enter. City Bd. of Educ.*, 273 F. Supp. 2d 1252, 1269 (M.D. Ala. 2003).

78. *Id.* at 1260-66.

79. *New Fairfield Bd. of Educ. v. Cortese*, No. CV030349701S, 2005 WL 647556 (Conn. Super. Ct. Jan. 24, 2005).

policy,⁸⁰ and held there was no unjust enrichment in the parents' keeping \$19,000 in settlement proceeds because the amount represented a valid settlement for the parents' tuition reimbursement claims for the previous school year.⁸¹

Considerations other than public policy may come into play when the law requires judicial approval of a settlement, as with the settlement of purely monetary claims involving a minor-child plaintiff. In a proceeding to approve a minor-child settlement of a court case involving claims under IDEA, section 504 of the Rehabilitation Act, and other laws, a court rejected an uncontested motion to enter an approval and dismiss the case.⁸² Applying state law best-interests-of-the-child standards, the court ruled that the proponents of the settlement had failed to provide adequate information about the condition of the child, the adequacy of the monetary settlement, and the reasonableness of the attorneys' fees portion for the court to enter approval at that time.⁸³

B. Enforcement of Settlements

Questions exist about courts' jurisdiction to enforce settlements, and whether settlements can be enforced directly in court or whether parental claims that the school district failed to obey a settlement must first be administratively exhausted. The Improvement Act established that settlements reached either at mediation or at the resolution session are enforceable in federal district court or state court.⁸⁴ The absence of any mention of an exhaustion requirement implies that if the opposing party violates a settlement agreement reached at either of these two sorts of meetings, direct enforcement will be available, and exhaustion through a due process hearing will not be necessary.

Nevertheless, some courts have required exhaustion for enforcement of settlements reached at mediation or the resolution session. In *R.K. v. Hayward Unified School District*,⁸⁵ the plaintiff sought a declaratory judgment of the parties' rights and obligations

80. *Id.* at *5.

81. *Id.* at *6.

82. *Johnson v. Clearfield Area Sch. Dist.*, 319 F. Supp. 2d 583 (W.D. Pa. 2004).

83. *Id.* at 587-92.

84. 20 U.S.C. § 1415(e)(2)(F)(iii) (mediation), (f)(1)(B)(iii)(II) (resolution session) (2006).

85. No. C 06-07836 JSW, 2007 WL 2778702 (N.D. Cal. Sept. 21, 2007).

under a settlement agreement reached at mediation that called for the child to be placed at a private school.⁸⁶ The plaintiff alleged that the school district failed to comply with the settlement by not facilitating necessary meetings and not permitting the parents' expert to attend meetings that did occur; by the time of the litigation, the private school had discharged the child and the child was out of school entirely.⁸⁷ The court found jurisdiction for the action to enforce the agreement pursuant to the new IDEA provision as well as on the basis that a claim concerning an IDEA settlement agreement arises under federal law, but it dismissed the case on the ground that exhaustion was required.⁸⁸ Relying primarily on cases involving settlements not reached at mediation, the court reasoned that the presence of jurisdiction did not satisfy the exhaustion requirement generally applicable to IDEA disputes, and further stated that the case would benefit from development of the record at an administrative hearing.⁸⁹ In another case, *Pedraza v. Alameda Unified School District*,⁹⁰ the court ruled that it had jurisdiction over a dispute regarding an alleged failure to provide services and reimbursement agreed upon in a settlement reached at mediation when the parents contended that the failure resulted in denial of an appropriate education.⁹¹ The court found that the exhaustion requirement applied to settlements reached at mediation, but ruled that in the particular case exhaustion would be excused on the ground that it was futile.⁹² The court relied on the fact that a complaint filed with the state education department had failed to produce enforcement.⁹³ Courts have also dismissed actions based on breaches of settlement agreements reached outside of mediation or

86. *Id.* at *1, *6. The plaintiff asserted other claims as well. See generally *R.K. v. Hayward Unified Sch. Dist.*, 246 F. App'x 474 (9th Cir. 2007) (affirming denial of temporary order).

87. *R.K.*, 2007 WL 2778702, at *2.

88. *Id.* at *6–*9.

89. *Id.* at *7–*8. The court disagreed with an order from the state hearing authority saying the state authority lacked the jurisdiction to address a breach of the settlement agreement. *Id.* at *8.

90. No. C 05-04977 VRW, 2007 WL 949603 (N.D. Cal. Mar. 27, 2007).

91. *Id.* at *2, *3, *7.

92. *Id.* at *5–*7.

93. *Id.* at *6.

the resolution session, typically citing lack of jurisdiction or failure to exhaust.⁹⁴

Cases such as *E.D.* and *School Board v. M.C.*⁹⁵ point in the opposite direction, however. The *M.C.* court said that the Department of Administrative Hearings did not have jurisdiction over due process hearings for enforcement of settlement agreements and suggested that jurisdiction existed in the state's circuit court.⁹⁶ In *E.D.*, the federal court directly enforced key provisions of a settlement agreement, though it considered with regard to each breach of the agreement whether the school district had deprived the child of free, appropriate public education by noncompliance.⁹⁷ An additional court ruled that a settlement agreement embodied in an individualized educational program (IEP) may be enforced directly in court without exhaustion, relying on legislative history and precedent establishing that failures to provide services listed in an IEP are matters that can be brought directly to the judiciary.⁹⁸ Still another court applied 42 U.S.C. § 1983 as a remedy for violation of IDEA and entered a \$10,000 damages judgment when a school district failed to provide compensatory education in accordance with agreements that it made in settling a due process proceeding.⁹⁹

IV. IDEA'S OFFER-OF-SETTLEMENT RULE

Under 20 U.S.C. § 1415(i)(3)(D)(i), if parents reject a written offer of settlement that is as favorable as or more favorable than what they obtain at hearing, fees accrued after the offer was received may not be awarded to them, though there is an exception if the parents

94. *E.g.*, *J.M.C. v. La. Bd. of Elementary & Secondary Educ.*, 584 F. Supp. 2d 894 (M.D. La. 2008); *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, No. 5:06-CV-139, 2007 WL 2219352 (W.D. Mich. July 27, 2007); *M.J. v. Clovis Unified Sch. Dist.*, No. 1:05-CV-00927 OWW LJO, 2007 WL 1033444 (E.D. Cal. Apr. 3, 2007).

95. 796 So. 2d 581 (Fla. Dist. Ct. App. 2001).

96. *Id.* at 582–83. *But see* *H.C. v. Colton-Pierrepont Cent. Sch. Dist.*, 567 F. Supp. 2d 340, 344 (N.D.N.Y. 2008) (ruling that it was error for hearing officer and state administrative review officer to refuse to consider claim that school district breached settlement agreement, reasoning that hearing officer had duty to enforce settlement), *vacated*, 341 F. App'x 687 (2d Cir. 2009) (holding that hearing officer lacked authority to enforce settlement agreement in case; leaving open on remand question whether district court had jurisdiction to enforce agreement).

97. *E.D. ex rel. Dukes v. Enter. City Bd. of Educ.*, 273 F. Supp. 2d 1252, 1260–66 (M.D. Ala. 2003).

98. *McClendon v. Sch. Dist.*, No. 04-1250, 2004 WL 2440661 (E.D. Pa. Oct. 29, 2004).

99. *Reid v. Sch. Dist.*, No. Civ. A. 03-1742, 2004 WL 1926324 (E.D. Pa. Aug. 27, 2004).

prevail and were substantially justified in rejecting the settlement offer.¹⁰⁰ This provision is an administrative version of the rule that applies to civil disputes in the federal courts, Federal Rule of Civil Procedure 68, and is similarly designed to promote settlement.¹⁰¹ The offer must be made more than ten days before the due process hearing begins and may be accepted within ten days.¹⁰²

Students of economics question the effectiveness of rules like Rule 68, which provide only one side of the dispute (the claimant) an incentive to settle.¹⁰³ They submit that the rules bias offers downward but leave the probabilities of settlement unchanged.¹⁰⁴ Professor Geoffrey P. Miller posits that parties to disputes base their settlement postures on what they perceive as the likely outcome of continuing to litigate the hearing or court case.¹⁰⁵ For the person bringing the case, the settlement demand is the expected recovery, discounted by the probability of losing and getting nothing at all, minus unrecovered litigation costs.¹⁰⁶ For the respondent, the offer is the claimant's expected recovery, discounted by the probability of the claimant losing the case, plus litigation costs that the respondent must pay.¹⁰⁷ A provision such as Rule 68 or the offer-of-settlement provision in IDEA, which reduces the recovery that the parents are likely to receive (if the offer is rejected, the fees recovery goes down), creates an incentive for the parents to decrease the amount of monetary and other relief they demand.¹⁰⁸ But school districts perceive the same likelihood of reduction in the expected recovery by the parents, and can be expected to decrease their offers commensurately.¹⁰⁹ The parties' settlement figures are thus likely to

100. 20 U.S.C. § 1415(i)(3)(E) (2006).

101. § 1415(i)(3)(D)(i)(I).

102. § 1415(i)(3)(D)(i)(I)–(II).

103. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 541 (4th ed. 1992); David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 J. LEGAL STUD. 225, 225–26 (1994); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 94 (1986).

104. POSNER, *supra* note 103, at 541; Anderson, *supra* note 103, at 225–26; Miller, *supra* note 103, at 94.

105. Miller, *supra* note 103, at 94–95.

106. *Id.* at 96–100.

107. *Id.* at 98–100.

108. See *id.* at 103.

109. See *id.* at 104, 110–12. Miller, of course, is discussing general civil litigation, not special education litigation.

stay as far apart from each other as they would be if no such rule existed; the demand and offer will simply be at a lower amount than if there were no rule. As Miller points out, the problem could be solved by creating an incentive for both claimant and respondent to settle, as by imposing extra fees on the respondent if the claimant's demand is rejected and the claimant recovers more than the demand.¹¹⁰ No proposal of this type has emerged since creation of the offer-of-settlement rule, however, and none was ever on the table during the recent reauthorization of IDEA.

Courts have generally been sensitive to the fact that parents may view some offers from school districts as less favorable than the relief finally obtained, even though the offer may look more attractive from other perspectives.¹¹¹ A recent case along these lines is *Benito M. v. Board of Education*,¹¹² which held that the outcome of the due process hearing was more favorable than the offer of judgment when the settlement offer included a day school placement with transportation for two years, an assistive technology evaluation with a subsequent IEP meeting to consider the evaluation results, and a future IEP meeting to implement a change in placement.¹¹³ In contrast, the hearing officer ordered that the child remain at the specific school where the parent had placed the child and that the school district pay the tuition for the rest of that school year, that the district schedule an IEP meeting to determine the child's placement for the following school year, and that the district provide weekly thirty-minute compensatory speech-language services for the following school year.¹¹⁴ A similar decision, *B.R. v. Lake Placid Central School District*,¹¹⁵ awarded a parent \$18,874 in attorneys' fees upon finding the consent decree that resolved the case more favorable than the defendant's offer of settlement in that the decree gave the parent more input on the selection of an expert evaluator and greater specificity with regard to the length of the school day, the

110. *Id.* at 123–25.

111. *See, e.g.,* *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 897 (9th Cir. 1995) (finding result of proceedings more favorable than district's offer because child was not forced to change schools).

112. 544 F. Supp. 2d 713 (N.D. Ill. 2008).

113. *Id.* at 719–20.

114. *Id.* at 717–18.

115. No. 07-CV-1195, 2009 WL 667453 (N.D.N.Y. Mar. 10, 2009).

exact number of compensatory education sessions, the methods of interaction with peers, and the permissible use of physical restraint.¹¹⁶

The rules concerning mediation may interact in unpredictable ways with the rules regarding offers of settlement. In *J.D. v. Kanawha County Board of Education*,¹¹⁷ the court refused to consider whether the written offer of settlement could provide the basis for limiting the parents' attorneys' fees, reasoning that the offer "referred to mediation discussions by offering to settle 'on the terms and conditions set forth in the settlement agreement reached but not signed at the mediation session.'" ¹¹⁸ Since mediation discussions are confidential, the school district could not introduce an agreement reached but not signed at mediation, and thus the district had no way to sustain its claim that the litigated outcome was no more favorable than the offer.¹¹⁹

Inclusion or exclusion of attorneys' fees may be an issue in determining whether a litigated result is more favorable. In *Hawkins v. Berkeley Unified School District*,¹²⁰ the court declared a parent substantially justified in rejecting a settlement offer including only \$500 in fees when the parent's attorneys had already incurred \$9,000 in fees.¹²¹ By contrast, in *Olivas v. Cincinnati Public Schools*,¹²² the court ruled that a settlement that was exactly what the hearing officer eventually ordered with respect to services for the child but included only \$1,000 in attorneys' fees barred recovery of fees incurred after the offer.¹²³

Finally, it must be noted that although the statutory rule is an analogue to Rule 68, the analogy is less than perfect, and the differences may create a problem. A Rule 68 offer is an offer of judgment.¹²⁴ A judgment is a judicial action, enforceable by ordinary processes of execution, ultimately backed by the contempt

116. *Id.* at *2–*3, *5.

117. 571 F.3d 381 (4th Cir. 2009).

118. *Id.* at 385.

119. *Id.*

120. No. C-07-4206 EMC, 2008 U.S. Dist. LEXIS 94673 (N.D. Cal. Nov. 20, 2008).

121. *Id.* at *61.

122. 872 N.E.2d 962 (Ohio Ct. App. 2007).

123. *Id.* at 967–68.

124. FED. R. CIV. P. 68.

sanction.¹²⁵ A settlement under 20 U.S.C. § 1415(i)(3)(D)(i) does not have the character of a judgment, and, as noted, there are serious issues about settlements' enforceability.¹²⁶ For this reason, it is doubtful whether a settlement is ever as good as or better than a due process hearing decision affording relief to the claimants. Although even a decision in a fully litigated due process case is not a judicial judgment of the type Rule 68 contemplates, it is a final order, and under the leading case, *Robinson v. Pinderhughes*,¹²⁷ it may be enforced in court pursuant to 42 U.S.C. § 1983 without further administrative exhaustion.¹²⁸ It is thus a far more valuable item than any private settlement.

V. FORM OF SETTLEMENT AND ITS IMPACT ON ATTORNEYS' FEES REQUESTS

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,¹²⁹ the Supreme Court held that under the attorneys' fees provisions relevant to that case, settlements do not entitle parties to fees unless the settlements have a "judicial imprimatur," something that is true for judicial consent decrees but not for ordinary private settlements of lawsuits.¹³⁰ The previous approach, termed the "catalyst theory," permitted an award of fees when the filing of the case was a catalyst for voluntary change on the part of the defendant.¹³¹ Courts have all but universally applied *Buckhannon's* abolition of the catalyst rule to the provision of IDEA governing the award of attorneys' fees to prevailing parents.¹³²

Questions, however, remain about how to apply the *Buckhannon* rule to special education disputes. Hearing officers do not ordinarily

125. GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE 1153 (9th ed. 2005).

126. See *supra* Section III.B (regarding enforceability issues).

127. 810 F.2d 1270 (4th Cir. 1987).

128. *Id.* at 1272–75.

129. 532 U.S. 598 (2001).

130. *Id.* at 602–05.

131. Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 363–64 (2004) (discussing catalyst theory and criticizing *Buckhannon*).

132. *E.g.*, *Bingham v. New Berlin Sch. Dist.*, 550 F.3d 601 (7th Cir. 2008) (reaffirming applicability of *Buckhannon* to IDEA cases).

enter orders termed “consent decrees” in special education cases.¹³³ The issue thus becomes what forms of hearing officer action will be considered sufficiently analogous to the entry of a consent decree to qualify a prevailing parent for fees, when the settlement itself does not include a fees award. Several courts have determined that fees may be awarded on the basis of the entry of an agreed order at a due process hearing,¹³⁴ or when an agreement was read into the record in front of a hearing officer.¹³⁵ The leading case is *A.R. ex rel. R.V. v. New York City Department of Education*,¹³⁶ which affirmed an award of fees when hearing officers placed the words “so ordered” on settlement agreements.¹³⁷ In *V.M. v. Brookland School District*,¹³⁸ the court awarded fees on the basis of a negotiated settlement agreement presented to the hearing officer as a consent order and incorporated into the hearing officer’s decision.¹³⁹ By contrast, ordinary private settlements have been held not to support applications for fee awards because of *Buckhannon*.¹⁴⁰

A related issue is whether the parent can use the right of appeal to challenge a hearing officer’s refusal to memorialize a settlement in a form having the hearing officer’s imprimatur. In *Traverse Bay Area Intermediate School District v. Michigan Department of Education*,¹⁴¹ the parties reached a settlement agreement pursuant to an offer of judgment, and the parent’s counsel indicated an intention to file a motion asking the hearing officer to review the settlement and incorporate it into an order of dismissal.¹⁴² However, the hearing

133. See *infra* notes 142–147 and accompanying text.

134. *E.g.*, *Brandon K. v. New Lenox Sch. Dist.*, No. 01 C 4625, 2001 WL 1491499, at *2 (N.D. Ill. Nov. 23, 2001).

135. *E.g.*, *Jose Luis R. v. Joliet Twp. High Sch. Dist.*, No. 01 C 4798, 2001 WL 1000734, at *2 (N.D. Ill. Aug. 29, 2001). *Contra* *Jose Luis R. v. Joliet Twp. High Sch. Dist.*, No. 01 C 4798, 2002 WL 54544, at *3–*4 (N.D. Ill. Jan. 15, 2002) (ultimately rejecting award of fees on that basis).

136. 407 F.3d 65, 65 (2d Cir. 2005).

137. *Id.* at 65; see also *V.G. v. Auburn Enlarged Cent. Sch. Dist.*, No. 5:06-CV-531 (NAM/GHL), 2008 WL 5191703, at *4–*5 (N.D.N.Y. Dec. 9, 2008) (awarding fees on basis of consent decree ordered by hearing officer, refusing to inquire as to thoroughness of hearing officer review), *aff’d*, 349 F. App’x 582 (2d Cir. 2009).

138. No. 3:05CV00232 JMM, 2008 WL 2001733 (E.D. Ark. May 6, 2008).

139. *Id.* at *4.

140. See *Bingham v. New Berlin Sch. Dist.*, 550 F.3d 601, 603 (7th Cir. 2008) (collecting cases).

141. No. 5:06-CV-139, 2008 WL 351651 (W.D. Mich. Feb. 6, 2008).

142. *Id.* at *2.

officer refused.¹⁴³ The court held that under those circumstances the state review officer lacked authority to enter the agreement as a consent order incorporating the terms of settlement over the objection of the school district.¹⁴⁴ The court nevertheless awarded the parent fees on the basis of the district's unsuccessful effort to enforce settlement agreement provisions against the parent.¹⁴⁵ Similarly, in *Wright v. District of Columbia*,¹⁴⁶ the court denied fees when, although the parties agreed during the hearing that the district would conduct a psychosocial evaluation for the child and convene a multi-disciplinary team and student evaluation plan meeting, the hearing officer issued an order stating that the matter was settled without a prevailing party.¹⁴⁷

Nevertheless, a case is not made moot when the defendant offers full relief on the merits in a private settlement that does not carry a judicial imprimatur and so lacks the enforceability of a settlement that has judicial approval.¹⁴⁸ Judicial imprimatur may come in the form of a retention of jurisdiction after settlement, even a retention of jurisdiction over the fees issue. Applying Ninth Circuit authority, a court has ruled that retention of jurisdiction to resolve the issue of attorneys' fees is itself sufficient judicial imprimatur to support the entry of a fees award.¹⁴⁹

VI. EVALUATION: IMPROVING THE LAW OF SPECIAL EDUCATION SETTLEMENT

At this point, there seems little justification for further tinkering with the mechanics of the IDEA mediation and resolution session.

143. *Id.*

144. *Id.* at *7.

145. *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, No. 5:06-CV-139, 2008 WL 2397631, at *3-*4 (W.D. Mich. June 11, 2008).

146. No. 05-0990 (RWR), 2007 WL 1141582 (D.D.C. Apr. 17, 2007).

147. *Id.* at *1.

148. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 932 (W.D. Tex. 2008). In a later ruling, the Fifth Circuit vacated an attorneys' fees award to the parent for work after the offer of settlement on the ground that the litigated result was no more favorable than the settlement offer, the parent was not justified in rejecting the settlement, and the settlement would have been fully enforceable in court under 20 U.S.C. § 1415(f)(1)(B)(iii)(II) because it was offered at the resolution session. *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417, 425-29 (5th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3566 (U.S. Mar. 16, 2010) (No. 09-1127). The settlement offer included reasonable fees to date. *Id.* at 419.

149. *Hawkins v. Berkeley Unified Sch. Dist.*, No. C-07-4206 EMC, 2008 U.S. Dist. LEXIS 94673, *19-*20 (N.D. Cal. Nov. 20, 2008).

Similarly, although one can quarrel with the results in any given case, it seems sensible as a general matter to enforce settlement agreements as written but leave the door slightly ajar for defenses to enforcement based on public policy, unconscionability, or unforeseeable changes of circumstances.

The jurisdiction and exhaustion problems with enforcing settlement agreements are a different matter. Whether there is federal jurisdiction to enforce a private settlement—essentially a contract—that resolves a claim under a federal statute and ought to be interpreted consistently with the purposes of the federal law raises the classic question of what constitutes federal question jurisdiction when the federal statute does not create the cause of action asserted in the case.¹⁵⁰ Establishing federal jurisdiction for actions to enforce special education settlements would certainly encourage parties to settle by guaranteeing that a tribunal with expertise in the federal special education law will stand ready to make the settlement stick if that is what the law requires. But unless one finds an implied cause of action under the statute or can rely on a cause of action under 42 U.S.C. § 1983 for a violation of IDEA,¹⁵¹ the present legal basis for

150. Compare *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (finding no jurisdiction in absence of federal cause of action), with *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921) (finding federal jurisdiction over state law cause of action incorporating element turning on federal law). Leading cases from the present era are *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (finding no jurisdiction in product liability action turning on alleged violation of Federal Food, Drug, and Cosmetic Act) and *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005) (finding federal jurisdiction over state law cause of action to quiet title when title hinged on federal law regarding notice of seizure of land by federal agency). See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 795–800 (6th ed. 2009) (discussing scope of federal question jurisdiction after *Merrell Dow* and *Grable & Sons* and collecting secondary authorities). A federal court does not have jurisdiction to enforce a settlement agreement in one of its own cases in the absence of an independent basis for federal jurisdiction, unless the court has made compliance with the agreement or retention of jurisdiction part of its order disposing of the case. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381–82 (1994).

151. Courts have mixed views on the availability of a cause of action under § 1983 for violations of IDEA when the explicit cause of action under 20 U.S.C. § 1415 is inapplicable. Compare *J.S. v. Isle of Wight County Sch. Bd.*, 402 F.3d 468 (4th Cir. 2005) (finding § 1983 not available) with *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997) (permitting § 1983 cause of action). See generally MARK C. WEBER, *SPECIAL EDUCATION LAW AND LITIGATION TREATISE* § 21.6(1)–(2), at 21:7–21:9 (2d ed. 2002) (collecting and analyzing cases). Most cases that reject the § 1983 cause of action are damages actions, and some of the same circuits that do not allow damages actions allow § 1983 actions for injunctive relief, at least in limited circumstances. See, e.g., *Robinson v. Pinderhughes*, 810 F.2d 1270 (4th Cir. 1987).

jurisdiction is shallow.¹⁵² An amendment to IDEA to create the jurisdiction would appear to be in order, just as Congress established jurisdiction for actions to enforce settlements reached at mediation or the resolution session.¹⁵³

If jurisdiction exists for settlement enforcement claims, as it undeniably does for settlements reached at mediation and the resolution session, there is no justification to impose an exhaustion requirement. An exhaustion requirement puts the aggrieved party literally back at square one, having to litigate the case that was supposed to have been resolved; that remains true even if the hearing officer is willing to transform the claim into one over the breach of the agreement itself, something that not all hearing officers are willing to do nor all courts willing to require.¹⁵⁴ Actions to enforce special education settlement agreements need not be burdensome to the courts. By and large, they will hinge on the straightforward question whether the parties have or have not complied with the letter of the agreement. Far more costly in terms of judicial and administrative economy is the uncertainty surrounding the enforceability of settlements.

It is difficult to be enthusiastic about the operation of the offer-of-settlement rule. There is no reason to believe that it actually promotes settlement, and special education cases—complex disputes that typically involve ongoing placements and services, compensatory programs, evaluations, behavior programs, and many other things in addition to cash awards—seem poorly suited to evaluations of whether an offer is or is not superior to a litigated result. The outcomes in the cases appear to manifest a judicial

152. See *Grable & Sons*, 545 U.S. at 318–20 (stressing rarity of applicability of federal jurisdiction to cases without federal causes of action).

153. One might argue that an inference can be drawn from the addition of the jurisdictional provisions for mediation and dispute resolution that there is no jurisdiction for enforcement of other settlements. There is nothing in the legislative history of the 2004 amendments supporting this argument, however, and IDEA is anything but the sort of tightly constructed statute for which it may be possible to draw negative inferences about one remedy from the explicit provision of another. See *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2496 (2009) (finding existence of tuition reimbursement remedy under general provisions of IDEA despite specific provision of remedy under conditions inapplicable to facts of case in other part of statute).

154. See *E.D. el rel. Dukes v. Enter. City Bd. of Educ.*, 273 F. Supp. 2d 1252 (M.D. Ala. 2003) (enforcing settlement but requiring showing of denial of appropriate education for each alleged breach).

reluctance to second-guess claimants who reject settlements.¹⁵⁵ Adoption of a two-way offer-of-settlement rule seems unlikely. In the absence of a movement to repeal the offer-of-settlement provision, perhaps the best that can be hoped for is the continued interpretation of the rule in the way that most courts have done. On the specific issue of inclusion or noninclusion of fees in offers of settlement, it is harsh and nonsensical to view a settlement offer as equally favorable to claimants when it contains no fees or an unrealistically low amount of fees and the litigated outcome contains the same relief but will support a full fees award if such a claim is asserted in a subsequent civil action. Holdings that run in the opposite direction should be rejected.¹⁵⁶

Congressional action may be necessary to clear up the ambiguities created by the application of *Buckhannon* to special education cases. Expressly permitting hearing officers to enter consent decrees would be one possibility. If jurisdiction to enforce settlements is not provided to courts, it would help if Congress at least clarified when a hearing officer may or must retain jurisdiction to enforce an agreed disposition. Clarity on that issue would in turn promote clarity on the fees issue by dividing settlements into those that are like consent decrees (when jurisdiction to enforce is retained) and those that are not (when no jurisdiction to enforce exists).

VII. CONCLUSION

The description of the law of special education settlement provided above illustrates, if nothing else, the complexity of the issues involved. The suggestions advanced above are hardly radical in nature, but they may make it easier for parties in special education cases and their advocates to sleep at night, less worried whether settlements will stick and what to do if they do not.

155. See *supra* text accompanying notes 111–115 (discussing cases finding offer not superior to litigated result).

156. See *supra* text accompanying notes 119–121 (discussing offer-of-settlement cases with and without fees in offer).

