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# OVER-DUE PROCESS REVISIONS FOR THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Perry A. Zirkel\*

The Individuals with Disabilities Education Act (IDEA), which was originally passed in 1975 as the Education of the Handicapped Act, Part B,<sup>1</sup> relies on a system of procedural safeguards to assure that each eligible child receives a free appropriate public education (FAPE) in the least restrictive environment (LRE).<sup>2</sup> A team, including the child's teacher and parent, is supposed to develop an individualized education program (IEP) for the child.<sup>3</sup> If disputes arise between the parent and the district with regard to eligibility, appropriateness, or any other matter under IDEA, they are to be resolved via a due process hearing conducted by an impartial hearing officer.<sup>4</sup> The deadline for the hearing officer's decision is forty-five days.<sup>5</sup> Under the IDEA's option for a state-level review where the hearing is at the local level, a majority of states has established a second tier of administrative proceedings that may be invoked by either party.<sup>6</sup> The maximum time period for completing the second-tier review allocated by the regulations is thirty days.<sup>7</sup> Finally, either party may appeal to state or federal court.<sup>8</sup>

## I. THE DUE PROCESS PROBLEM

Based on more than fifteen years of experience under the due process procedures of the IDEA, observers are increasingly in-

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1. The IDEA was also known as "P.L. 94-142" and the "Education for All Handicapped Children Act of 1975." See 20 U.S.C. § 1400 (1988).

2. 20 U.S.C. §§ 1400-1485 (1988). A year after the passage of the IDEA, a commentator prophetically observed with regard to its due process safeguards: "A profound faith in the adversary process is required to believe that this procedure will assure the handicapped child an appropriate education." Donald W. Keim, *Legislative Notes: The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 143 (1976).

3. 20 U.S.C. §§ 1401(a)(20), 1412(4), 1414(a)(5) (1988 & Supp. 1992); 34 C.F.R. § 300.340 to .344 (1993).

4. 20 U.S.C. § 1415(b)(2) (1988); 34 C.F.R. § 300.506 (1993).

5. 34 C.F.R. § 300.512(a) (1993).

6. 20 U.S.C. § 1415(c) (1988); 34 C.F.R. § 300.510 (1993).

7. 34 C.F.R. § 300.512(b) (1993).

8. 20 U.S.C. § 1415(e)(2) (1988); 34 C.F.R. § 300.511 (1993).

veighing against the cost-benefits of the present system.<sup>9</sup> For example, while supporting the spirit of the IDEA, a former school principal identified the problem as "the cumbersome implementation of a law that has magnified the concept of due process to the point that it overshadows other school-based concerns, such as instruction and learning."<sup>10</sup> The key aspects of this core problem are several and interrelated.

First, the process has become unduly time-consuming and open-ended. The judiciary, including the Supreme Court, has recognized that the IDEA's dispute resolution procedures are "ponderous."<sup>11</sup> Delays are rife in terms of the forty-five-day rule,<sup>12</sup> and it is not at all unusual to have a court ultimately decide the appropriateness of an IEP two or more years after the period for which it was proposed.<sup>13</sup> It is also not unusual for a case to return to due

9. See, e.g., DONALD M. SACKEN, REFLECTIONS ON AN ADVERSARIAL PROCESS: THE CONFESSIONS OF A SPECIAL EDUCATION HEARING OFFICER 6 (1988) (UCEA monograph); Steven S. Goldberg, *The Failure of Legalization in Education: Alternative Dispute Resolution and the Education for All Handicapped Children Act of 1975*, 18 J.L. & EDUC. 441, 444-46 (1989); Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILDREN 546, 554 (1991); David L. Kirp & Donald N. Jensen, *What Does Due Process Do?*, 73 PUB. INTEREST 75, 89 (1983); Martha M. McCarthy, *Can Costs Be Considered in Special Education Placements?*, 22 J.L. & EDUC. 265, 282 (1993); David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 L. & CONTEMP. PROBS. 63, 78-79, 86 (1985); Allan G. Osborne & Philip DiMattia, *Attorneys Fees Are Available for Administrative Proceedings Under the EHA*, 66 EDUC. L. REP. 909, 919 (West 1991).

10. Pete Idstein, *Swimming Against the Mainstream: Seeking More Services for Special Elementary School Students*, 75 PHI DELTA KAPPAN 336, 337 (1993).

11. *Burlington Sch. Comm'n v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 370 (1985), cited in *Honig v. Doe*, 484 U.S. 305, 322 (1988), *Frutiger v. Hamilton Cent. Sch. Dist.*, 928 F.2d 68, 73 (2d Cir. 1991). Earlier, the Supreme Court recognized that the IDEA is largely procedural. *Board of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982).

12. See, e.g., *Amann v. Stov Sch. Sys.*, 982 F.2d 644, 653 (1st Cir. 1992); *Green Local Sch. Dist. Bd. of Educ. v. Redovian*, 18 Individuals with Disabilities Educ. L. Rep. (IDELR) 1092 (N.D. Ohio 1992); *Texas Educ. Agency*, 18 IDELR 628 (Office Civ. Rights 1991); *Wilson County (TN) Sch. Dist.*, 18 IDELR 839 (Office Civ. Rights 1991); *Pennsylvania Dep't of Educ.*, 353 Educ. Handicapped L. Rep. (EHLR) 259 (CRR 1989); cf. *Caroline T. v. Hudson Sch. Dist.*, 915 F.2d 752 (1st Cir. 1990) (awarding attorneys' fees to school district for parents' egregious prologation of the hearing process). In Pennsylvania, home of the PARC case that led to the IDEA, the hearing stage more recently averages approximately 110 days, and the second-tier reviews average approximately 35 days. Correspondence from Right to Education Office, May 25, 1992 (on file with author). Pennsylvania's state education department had previously attempted to increase the time for the internal steps of the second-tier, but federal officials rejected the proposals that jeopardized the 30-day rule. *Inquiry of Helling*, 211 EHLR 69 (BEH 1978).

13. See, e.g., *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361 (1993) (8 years); *J.S.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991) (6 years); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990) (3.8 years); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) (2.7 years); *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988) (3.6 years). One of the resulting problems is whether to evaluate the appropriateness of an IEP as of the time it was proposed or as of the time of the trial. See, e.g., *Oberti*

process before or instead of resulting in final dispute resolution. For example, a recent Pennsylvania case, before going to court, consisted of: (1) six hearings resulting in 800 pages of recorded testimony during a nine-month period, (2) a seeming settlement lasting eighteen months, and (3) seven more hearings resulting in 1,000 pages of recorded testimony during another thirteen months. The total time, after a three-day court hearing fifteen months later and the court's decision another two months later, was four years, whereupon the case was still subject to a possible appeal.<sup>14</sup>

Second, the process is overly adversarial. The attorneys' fees amendment of 1986<sup>15</sup> has contributed to the "needless adversariness" on both sides.<sup>16</sup> In a recent presentation entitled "Special Education Due Process—Is the Tail Wagging the Dog?," Melinda Maloney, the editor-in-chief of the leading periodical in special education law, observed that contrary to their original intent as being informal, expedited dispute resolution proceedings, "due process hearings have become highly adversarial, political, formal judicial proceedings controlled by lawyers and hired experts."<sup>17</sup>

Third, the transaction costs are excessive, particularly in light of tight education budgets. For example, one recent due process hearing concerning one child in Pennsylvania spanned nineteen sessions and almost two years from filing until decision.<sup>18</sup> The cost of merely the transcript was \$27,000. The cost of the hearing of-

v. Board of Educ., 995 F.2d 1204, 1222 (3d Cir. 1993); *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040-41 (3d Cir. 1993); *Fuhrmann*, 993 F.2d at 1043 (Hutchinson, J., concurring).

14. *Dacyna v. School Dist.*, 19 IDELR 946 (E.D. Pa. 1993). Referring merely to the first phase, the judge commented: "[I]ncredible as it may seem . . . all the time spent in preparation for the previous hearings, at the hearings themselves and the countless hours outside of the hearings devoted to determining an appropriate plan for S.D. had figuratively gone down the drain." *Id.* at 960.

15. 20 U.S.C. § 1415(e)(4)(B) (1988 & Supp. 1992); see also 34 C.F.R. § 300.515 (1993).

16. See, e.g., *Howey v. Tippecanoe Sch. Corp.*, 734 F. Supp. 1485, 1491 (N.D. Ind. 1990) (quoting *Rossi v. Gosling*, 696 F. Supp. 1079, 1085 (E.D. Va. 1988)); see also Perry A. Zirkel, *Special Education: "Needless Adversariness,"* 74 PHI DELTA KAPPAN 809 (1993); Perry A. Zirkel, *A Special Education Case of Parental Hostility*, 73 Educ. L. Rep. 1 (West 1992).

17. Melinda Maloney, *Special Education Due Process—Is the Tail Wagging the Dog?*, Presentation at Alabama Department of Education Conference, Birmingham, Ala. (Mar. 4, 1993). Attorney Maloney serves as editor-in-chief of *Individuals with Disabilities Law Report* and the *Special Educator*, as well as other education and disability periodicals of LRP Publications in Horsham, Pennsylvania.

18. *In re Jeremy H.*, Special Educ. Op. No. 593 (Pa. Special Educ. App. Panel May 21, 1993). This hearing was not alone in consisting of a large number of sessions. See *In re Joshua F.*, Special Educ. Op. No. 540 (Pa. Special Educ. App. Panel Oct. 30, 1991) (19 sessions).

ficer, including travel expenses, was \$20,000.<sup>19</sup> Other costs prior to possible judicial appeal include the administrative expense of the second-tier appeal and, what is likely the largest item, the fees for the attorneys. As one of too many examples of high legal costs, in one decision the court awarded the parents \$861 for a related service and more than \$13,000 in attorneys' fees.<sup>20</sup>

Fourth, the clear majority of the cases that reach the courts contains either disputes about attorneys' fees or fact-based determinations about a particular child's IEP.<sup>21</sup> Many of the attorneys' fees decisions focus on determining "prevailing party" and "reasonable" amounts.<sup>22</sup> Almost all of the IEP decisions apply rather than refine the standards of FAPE and LRE to an individual child and, thus, do not serve as generalizable precedents. As a result, at a time of generally declining education litigation, reported case law concerning special education is exploding.<sup>23</sup>

Finally, parents tend to perceive the process as unfair.<sup>24</sup> Although at least partially attributable to the relatively low propor-

19. Telephone Interview with Carol Prouser, Right to Education Office, in Harrisburg, Pa. (May 5, 1993).

20. *Rapid City Sch. Dist. 51-4 v. Vahle*, 733 F. Supp. 1364, 1371 (D.S.D. 1990); see also *Barlow-Gresham Union High Sch. Dist. v. Mitchell*, 940 F.2d 1280 (9th Cir. 1991) (over \$19,000 in attorneys' fees for prehearing settlement); *Felter v. Cape Girardeau Sch. Dist.*, 810 F. Supp. 1062 (E.D. Mo. 1993) (\$1,645 reimbursement of transportation costs and \$22,000 of attorneys' fees and costs).

21. The typical case concerns the issue of what is the appropriate program, including placement in the LRE. See, e.g., Perry A. Zirkel, *Special Education Law Update III*, 83 Educ. L. Rep. 543, 544-46 (West 1993); Perry A. Zirkel, *Special Education Law Update II*, 66 Educ. L. Rep. 901, 901-03 (West 1991); Perry A. Zirkel, *Special Education Law Update*, 56 Educ. L. Rep. 20, 20-23 (West 1990).

22. See, e.g., *Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000 (8th Cir. 1991); *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932 (11th Cir. 1989), cert. denied, 110 S. Ct. 1117 (1990); *Hall v. Detroit Pub. Sch.*, 823 F. Supp. 1377 (E.D. Mich. 1993); *Lawyer v. Chesterfield County Sch. Bd.*, 20 IDELR 172 (E.D. Va. 1993); *Fischer v. Rochester Community Sch.*, 780 F. Supp. 1142 (E.D. Mich. 1991); *Mr. D. & Mrs. D. ex rel. Constance D. v. Gloucester Sch. Comm.*, 711 F. Supp. 66 (D.R.I. 1989); *Neisz v. Portland Pub. Sch. Dist.*, 684 F. Supp. 1530 (D. Or. 1988).

23. See, e.g., Michael Imber & Gary Thompson, *Developing a Typology of Litigation in Education and Determining the Frequency of Each Category*, 27 EDUC. ADMIN. Q. 225, 233 (1991); Perry A. Zirkel & Sharon Richardson, *The "Explosion" in Education Litigation*, 53 EDUC. L. REP. 767, 780 (West 1989).

24. See, e.g., MILTON BUDOFF & ALAN ORENSTEIN, *DUE PROCESS IN SPECIAL EDUCATION* 157, 293-94 (1982); Goldberg & Kuriloff, *supra* note 9, at 551; Kirp & Jensen, *supra* note 9, at 88; Lewis Romano, *A Study to Evaluate the Special Education Due Process Hearing Requirements in Virginia 90-91* (1982) (unpublished Ph.D. dissertation, Virginia Tech). *But cf.* Jacqueline Jackson, *A Descriptive Study of Special Education Due Process Hearings in the District of Columbia* 63 (1988) (unpublished Ph.D. dissertation, George Washington University) (solely District of Columbia school district, with only four hearing officers hearing almost two-thirds of the cases and with special placement deadline from *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)).

tion of due process hearings<sup>25</sup> and second-tier reviews<sup>26</sup> in which they prevail, parents tend to be less than satisfied with their experiences with the special education due process system.<sup>27</sup>

These problems have even received notice in the recent written opinions of review officers and judges. For example, in a recent administrative decision under the IDEA concerning the IEP of a child named Tony, review officer Larry Bartlett commented:

[I]t never ceases to amaze me how educators and parents can be so close and yet so far apart in doing what is in the best interest of the student. This situation presents an almost classic case. Here, the parents are interested, caring, and dedicated. The educators are no less interested in what is best for Tony. Yet, personality disputes and disagreements over inconsequential details of an education program have divided the persons most important to Tony's future educational development. . . .

. . . .  
It is hoped that this advocacy proceeding has not alienated the parties, as often happens . . . .<sup>28</sup>

In a similarly recent judicial opinion under IDEA concerning the IEP of another child with disabilities, federal Judge Ellis intoned:

[I]n reviewing the record of this case, the Court was struck by the speed with which the disagreement over Vernon's IEP was allowed to deteriorate into a wholly adversarial confrontation featuring entrenched, incompatible positions.<sup>29</sup>

25. See, e.g., Government Accounting Office, *Special Education: The Attorney Fees Provision of Public Law 99-372*, at 3 (1989); Kirp & Jensen, *supra* note 9, at 80; Peter J. Kuriloff, *Is Justice Served by Due Process?*, 48 *LAW & CONTEMP. PROBS.* 89, 99 (1985); Phyllis Monoson, *The Legal Aspects of Connecticut Special Education Hearing Decisions for Emotionally Disturbed and Learning Disabled Children* 111 (1987) (unpublished Ph.D. dissertation, University of Bridgeport); Linda O'Connor Rhen, *Special Education Due Process Hearings in Pennsylvania 1977-86*, 134 (1991) (unpublished Ph.D. dissertation, Temple University); Ralph Tarola, *The Relationship Between Selected Characteristics of Special Education Due Process Hearings, Their Outcomes, and the Outcomes of Subsequent Appeals* 47 (1991) (unpublished Ph.D. dissertation, Lehigh University).

26. See, e.g., Julius Menacker, *The "Due Weight" Standard for Special Education Hearing Appeals*, 73 *EDUC. L. REP.* 11, 15 (West 1992); O'Connor Rhen, *supra* note 25, at 133; Tarola, *supra* note 25, at 56.

27. Some studies have found that these proceedings had a destructive effect on the relationship between special education parents and public schools. See, e.g., Steven Goldberg, *The Legalization of Special Education: Perceptions of the Elements of Due Process by Parents and School Officials in Public Law 94-142*, 82 (1985) (unpublished Ph.D. dissertation, University of Pennsylvania); Cherie Simpson, *Parent Perceptions of the Special Education Due Process Hearing in Michigan* 224 (1984) (unpublished Ph.D. dissertation, Michigan State University).

28. Fort Madison Community Sch. Dist., 18 *IDELR* 1138, 1147 (Iowa SEA 1992).

29. *Lewis v. School Bd.*, 808 F. Supp. 523, 528 (E.D. Va. 1992). A federal judge in another jurisdiction echoed such sentiments as follows: "It is regretful that this matter has

Recognizing the special character of actions under the IDEA and attributing the problem to "systemic flaws" in the IDEA, including the point at which liability for attorneys' fees attaches, the judge suggested modifications, including "institutionalized mediation process to take over once school administrators and parents have reached an impasse in the development of an IEP."<sup>30</sup>

## II. THE PROPOSED SOLUTION

Commentators have suggested mandatory mediation<sup>31</sup> or other limited or skeletal solutions for the due process problem under the IDEA. For example, attorney Lynwood Beekman, who is a hearing officer in Michigan, has suggested that due process hearing decisions should be valid for a certain period of time, such as one year, without recourse to further changes or hearings during the period.<sup>32</sup> Attorney Deborah Mattison, a parents' advocate in Alabama, has suggested simplification of due process procedures, including a shorter statute of limitations.<sup>33</sup>

Congress, which is periodically required to review the IDEA, has also initiated some related reforms. For example, Representative John Duncan, of Tennessee, has introduced a bill that would restrict the availability of attorneys' fee awards under the IDEA to actions brought in state or federal court,<sup>34</sup> thus reversing the case law interpretations in favor of recovery at the first- and second-tier levels.<sup>35</sup>

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ended up in litigation where the parties are pitted against each other instead of working together. It is difficult to imagine a worse scenario from the point of view of [the child]." *Oberti v. Board of Educ.*, 789 F. Supp. 1322, 1337 (D.N.J. 1992), *aff'd*, 995 F.2d 1204 (3d Cir. 1993).

30. *Lewis*, 808 F. Supp. at 529.

31. *See, e.g.*, Goldberg, *supra* note 9, at 454. However, with a co-author, Goldberg subsequently suggested study of the timing and character of such mediation. Steven S. Goldberg & Kathleen K. Lynch, *Reconsidering the Legalization of School Reform: A Case for Implementing Change Through Mediation*, 7 OHIO ST. J. ON DISP. RESOL. 199, 214-15 (1992).

32. *14th Annual Institute Highlights Legal Issues in Special Education*, 8 SPECIAL EDUCATOR 262 (1993).

33. *Id.* Mattison also advocated the eventual phase-out of distinctions between regular and special education students. *Id.* On this larger level, attorney Matthew Cohen has similarly suggested expanding the Act's procedural safeguards to all public school students, not just those with disabilities. *Id.*

34. *Bill Would Limit Attorneys' Fees Under IDEA*, 9 SPECIAL EDUCATOR 20 (1993).

35. *See, e.g.*, *Moore v. District of Columbia*, 907 F.2d 165, 167-69 (D.C. Cir.), *cert. denied*, 498 U.S. 998 (1990); *McSomebodies v. Burlingame Elementary Sch. Dist.*, 897 F.2d 974, 975 (9th Cir. 1990); *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932, 937 (11th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990). Some courts have extended this interpretation to earlier points than completion of the first-level hearing. *See, e.g.*, *Barlow-Gresham Union High Sch. Dist. v. Mitchell*, 940 F.2d 1280, 1285 (9th Cir. 1991) (settlement); *Angela L. v.*

However, a more systematic and specific solution is warranted that directly targets the due process procedures of the IDEA.<sup>36</sup> This proposal is a series of five related parts, or steps, that would enhance the authority and revise the approach of the due process hearing. Only two steps, the first and the fourth, require amendments to the IDEA,<sup>37</sup> although Congressional direction would be the preferred way to move matters forward in any event. Otherwise, the steps are proposed revisions in the IDEA regulations and the practices thereunder.<sup>38</sup>

First, like the posture of grievance arbitration in labor law, the due process hearing should be the final stage for most cases.<sup>39</sup> The decision would be binding on both parties, with judicial review only available for the occasional case that presented, as a primary matter, a purely legal issue.<sup>40</sup> For the relatively limited proportion

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Pasadena Indep. Sch. Dist., 918 F.2d 1188, 1193-94 (5th Cir. 1990) (settlement); Masotti v. Tustin Unified Sch. Dist., 806 F. Supp. 221, 224 (C.D. Cal. 1992) (mediation). *But cf.* Feneman v. Town of Gorham, 802 F. Supp. 542, 548-49 (D. Me. 1992) (IEP meeting).

36. Other problems specific to the IDEA that warrant review and revision are the funding of special education, the expansion and imprecision of eligibility, and manipulations of the placement process. *See, e.g.,* Joseph P. Shapiro et al., *Separate and Unequal*, U.S. NEWS & WORLD REP., Dec. 13, 1993, at 46. The National Association of State Directors of Special Education has suggested more specific problems and solutions. *See State Directors Offer IDEA Input to Congress*, 9 SPECIAL EDUCATOR 220 (1994). A related problem is developing more manageable coherence between the IDEA and the corresponding requirements of Section 504 of the Rehabilitation Act. For a comprehensive treatment of the latter requirements, see PERRY A. ZIRKEL, SECTION 504 AND THE SCHOOLS (1992).

37. It is not particularly difficult to amend the IDEA for such fine-tuning purposes as proposed here. For example, amendments in 1986 and 1990 legislation reversed *Smith v. Robinson*, 468 U.S. 992 (1984) (exclusivity) and *Dellmuth v. Muth*, 491 U.S. 223 (1989) (Eleventh Amendment immunity).

38. To the extent that state policies conflict with the IDEA and its regulations, they are subject to federal preemption. *See, e.g.,* Town of Burlington v. Department of Educ., 655 F.2d 428, 431 (1st Cir. 1981); Boone City R-IV Sch. Dist. v. Missouri State Bd. of Educ., 17 EHLR 946 (W.D. Mo. 1991); Tompkins v. Forest Grove Sch. Dist. No. 15, 558 EHLR 425, 428 (Or. Ct. App. 1987). Unlike the due process procedures under the IDEA, some matters are delegated to the states. *See, e.g.,* 34 C.F.R. §§ 300.8(b) (special education standards), 300.153(b)(2) (personnel standards), 300.504(b)(2) (parental consent for evaluation) (1993).

39. The labor arbitration model offers other importable features, such as the mutual selection process. *See, e.g.,* Spencer J. Salend & Perry A. Zirkel, *Special Education Hearings: Prevailing Problems and Practical Proposals*, 19 EDUC. & TRAINING MENT. RETARDED 29 (1984). The purpose would be to ensure the impartiality of the hearing officer, which is the focus of a separate analysis. Elaine A. Drager & Perry A. Zirkel, *Impartiality Under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. 11 (West 1993).

40. Here, the analogy in labor arbitration to "external law" is clearly limited. *See, e.g.,* Perry A. Zirkel, *The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards*, 1985 DET. C.L. REV. 31 (1985). Given that the framework is the IDEA rather than a collective bargaining agreement, the exclusion for legal questions would have to be more tightly drawn. The only other basis for review, much more closely akin to the Uniform Arbitration Act, would be limited grounds of fraud, misconduct, or bias. *See, e.g.,* Perry A. Zirkel & Peter D. Winebrake, *Legal Boundaries for Partiality and Misconduct of Labor Arbitrators*, 1992 DET. C.L. REV. 679 (1992).

of cases that are judicially reviewable,<sup>41</sup> the rulings of the hearing officer that are not inextricably intertwined with the appealable legal issue would be binding and immediately effective.<sup>42</sup>

The first part of this proposal would require an amendment to the IDEA to delete the option of a second tier<sup>43</sup> and to restrict the option of judicial review.<sup>44</sup> The single tier should be at the state level, thus removing the influence of the school district in paying the hearing officer. The selection, training, and compensation of hearing officers should be the responsibilities of an independent and impartial state agency, as exemplified by Pennsylvania's Right to Education Office. In restricting the option of judicial review to major legal issues, the amendment would specify a traditional substantial evidence standard of review and limit the taking of additional evidence to exceptional cases. Without such guidance, courts have tended toward a *de novo* standard of review<sup>45</sup> and have varied widely in the taking of additional evidence, with the skew toward liberality.<sup>46</sup> This strengthening of the finality requirement of the IDEA<sup>47</sup> would have obvious advantages in terms of saving time and other transaction costs, thus redirecting attention and resources to the education of students with disabilities.

Second, due to the dramatically escalated importance of the due process hearing under the first proposed revision, the relevant

41. The category includes class action suits not subject to exhaustion, for they would be unaffected by this proposed amendment. *See, e.g.,* Cordero v. Pennsylvania Dep't of Educ., 795 F. Supp. 1352 (M.D. Pa. 1992); Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1989).

42. For example, where a hearing officer ruled that the school district's program was inappropriate and the parent's unilateral private-school placement was appropriate, the effects, such as tuition reimbursement, would be immediate, while the separable issue of compensatory education beyond the age of entitlement was on appeal. *Cf. Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860 (D.N.H. 1992).

43. 20 U.S.C. § 1415(c) (1988). This one-tier model is already the requirement for resolving disputes for students with disabilities under § 504 of the Rehabilitation Act. 34 C.F.R. § 104.36 (1993); Mississippi State Dep't of Educ., 352 EHLR 279 (Office Civ. Rights 1986).

44. 20 U.S.C. § 1415(e)(2) (1988).

45. *See, e.g.,* Board of Educ. v. Rowley, 458 U.S. 176, 205-06 (1982); Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127, 131 (5th Cir.); Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel*, WIDENER J. PUB. L. (forthcoming 1994).

46. For example, compare *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 790 (1st Cir. 1984), *aff'd sub nom.*, *School Comm. v. Department of Educ.*, 471 U.S. 359 (1985) with *Oberti v. Board of Educ.*, 995 F.2d 1204, 1207 (3d Cir. 1993).

47. *See, e.g.,* Muth v. Central Bucks Sch. Dist., 839 F.2d 113, 124-25 (3d Cir. 1988), *rev'd on other grounds sub nom.*, *Dellmuth v. Muth*, 491 U.S. 223 (1989). This change would also mitigate the costly consequences of the IDEA's "stay-put" provision. *See, e.g.,* *Pomona Unified Sch. Dist. v. Nelson*, 19 IDELR 903 (C.D. Cal. 1993).

regulation should specify that the hearing officer must have expertise in special education.<sup>48</sup> The premise of the requisite deference is expertise in the education of students with disabilities.<sup>49</sup> Some states, such as Virginia, have put the entire emphasis on the other foot, requiring hearing officers to be lawyers, who often do not have any specialized experience, much less training, in special education.<sup>50</sup> Such matters as the conduct of a hearing, the writing of decisions, and legal updates may be more economically and efficiently addressed through the preservice and inservice training of hearing officers in each state.<sup>51</sup>

Third, the conduct of the hearings should be redirected to a problem-solving, rather than adversarial, model. Whether mediation remains a separate and prior proceeding or an integral part of the hearing officer's function, the hearing officer should be actively engaged in leading the inquiry. Examples of different variations of this theme are not only the American models of grievance mediation<sup>52</sup> and med-arb,<sup>53</sup> but also the British<sup>54</sup> and Canadian<sup>55</sup> models of labor boards.<sup>56</sup> The only necessary revisions would be (1) to broaden, yet strengthen the comment about mediation in the regu-

48. 34 C.F.R. § 300.507 (1993). In contrast, the regulations specify that each side has the right, but not obligation, to be represented by "counsel and individuals with special knowledge or training with respect to the problems of children with disabilities." 34 C.F.R. § 300.508 (1993). Thus, the expertise criterion appears to be limited to lay advocates.

49. See, e.g., *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990); *Briggs v. Board of Educ.*, 882 F.2d 688, 693 (2d Cir. 1989); *Crocker v. Tennessee Secondary Athletic Ass'n*, 873 F.2d 933, 935-36 (6th Cir. 1989).

50. Telephone Conversation with Kathleen Mehfoud, Attorney, Richmond, Va. (May 3, 1993).

51. A related but more long-range desideratum would be national certification and training for hearing officers.

52. See, e.g., Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 Nw. U. L. REV. 270 (1982); Deborah A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 INDUS. REL. L.J. 523 (1987).

53. See, e.g., Lewis M. Gill, *The Nature of Arbitration: The Blurred Line Between Mediator and Judicial Arbitration Proceedings*, 39 CASE W. RES. L. REV. 545, 553 (1989); Sam Kagel, *Alternative Techniques: Combining Mediation and Arbitration*, 96 MONTHLY LAB. REV. 62 (1973).

54. See, e.g., BOB A. HEPPLE & SANDRA FREDMAN, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GREAT BRITAIN* (1986).

55. See, e.g., Paul C. Weiler, *Avoiding the Arbitrator: Some New Alternatives to the Conventional Grievance Procedure*, in PROCEEDINGS OF THE 30TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 19, 27 (Barbara D. Dennis & Gerald G. Somers eds., 1977).

56. A broader example of this same attitude is integrative bargaining. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981); FRED E. JANDT, *WIN-WIN NEGOTIATING: TURNING CONFLICT INTO AGREEMENT* (1985). There are, of course, cultural and institutional limits to such "transplantation." See, e.g., Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

lations<sup>57</sup> to at least permit and encourage, if not require, this more active, problem-solving approach; and (2) to lighten the legalization in the regulation about "hearing rights."<sup>58</sup>

Fourth, to reinforce this less adversarial mode, attorneys' fees should be limited to the judicial stage,<sup>59</sup> and school districts should be precluded from being represented by counsel at the hearing unless the parents are represented by counsel.<sup>60</sup> In order to allow for prompt preparation, the parents would be required to provide timely, written notice of their election to be represented by an attorney.<sup>61</sup>

Fifth, and finally, as a matter of state policy and practice, hearings in routine cases should be limited to one full day.<sup>62</sup> Also, hearing officers should be required to strictly adhere to the forty-five-day rule<sup>63</sup> as a condition for continuing as members of the state panel.<sup>64</sup>

Thus, the typical disputed case of determining the child's individually appropriate program in the LRE would be an expedited, problem-solving proceeding under the direction of an impartial hearing officer with special education expertise. "Adversariness" and legalisms would be minimized, and attorneys' fees would not

57. 34 C.F.R. § 300.506 note (1993).

58. 34 C.F.R. § 300.508(a) (1993). For example, the "five-day" rule for the disclosure of evidence should not apply to evidence elicited based on the hearing officer's inquiries. Similarly, electronic recordings, rather than written transcripts, should be the norm. Preferably, the regulation should add authorization for the hearing officer to take active problem-solving steps. See, e.g., CAL. EDUC. CODE § 56505.1 (West 1989 & Supp. 1994) (right to call hearing officer's own witnesses and to have conflicting experts discuss the issue on the record).

59. See *supra* note 34. The present bill to amend the IDEA would be more persuasive in this context. As an interim measure, Congress should at least mandate that the Government Accounting Office (GAO) conduct a second study of the impact of the 1986 attorneys' fees amendment to the IDEA. The GAO's first study, which was mandated in this amendment, was not given sufficient duration and, in any event, did not yield particularly reliable or useful data.

60. This change would be in the form of an addition to the "hearing rights" regulation. 34 C.F.R. § 300.508 (1993).

61. This notice should be a required part of their request for a hearing or, in the occasional case where the school district is the filing party, in a written response to the agency that coordinates hearings within a number of days specified by that agency.

62. It currently is not uncommon for hearings to start at approximately 7:00 p.m. for the convenience of the parents and to end at approximately 10:00 p.m. for the convenience of the school district personnel, thus contributing to multiple hearings that often are spaced weeks apart due to the attorneys' schedules. A full day dedicated to close the matter would better serve the interests of both the parties and the child.

63. See 34 C.F.R. § 300.512(a) (1993).

64. Another cautious but illustrative analogy from the labor field is expedited arbitration. See, e.g., Arnold Zack, *Suggested New Approaches to Grievance Arbitration, in PROCEEDINGS*, *supra* note 55, at 105, 111.

be an issue. In contrast, the occasional major legal issue, exemplified by the leading cases to date,<sup>65</sup> would be left, after exhaustion of this streamlined process, to litigation.

By separating the educational from the legal issues and differentiating the respective forums for decision making, the advantages are (1) capitalizing on the expertise of hearing officers and judges respectively, (2) reducing the pressure on tight school budgets and congested courts, and (3) mitigating the deleterious effects of delayed decisions.<sup>66</sup>

### III. CONCLUSION

The present system of due process under the IDEA is neither in the best interest of the child nor in the best interest of school systems. The problem is one of degree, not direction. Although parents' and school districts' attorneys, who are the principal beneficiaries of the present system, may unite to oppose the proposed changes, our current environment of cost consciousness and containment dictates that we improve the dispute resolution system of the IDEA; we can ill afford to do less in these financially tight times.<sup>67</sup> The purported statutory purposes of promptness<sup>68</sup> and partnership<sup>69</sup> are a distant dream, often replaced by a nightmare of

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65. See, e.g., *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361 (1993) (tuition reimbursement for unapproved schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (interpreter services and the Establishment Clause); *Honig v. Doe*, 484 U.S. 305 (1988) (lengthy suspensions); *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S. 359 (1985) (tuition reimbursement); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (the medical exclusion under "related services"); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) (the meaning of "appropriate"); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991) (LRE); *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986) (compensatory education); *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (extended school year).

66. For the routine mixed questions of fact and law, such as determining whether the school district's IEP is appropriate for the particular child, the substantial added cost of second-tier and judicial review is not outweighed by the speculative improvement in the quality of the decision. Cases of this type that move up the ladder often have a notable variance in outcome across the levels, leading to vexing questions of reliability and validity of decision making. In such cases, even if the highest decision among several levels was demonstrably the "best" decision, one wonders whether the costs to the parents, the district, and the child are worth it.

67. The increase in per-pupil expenditures during the past decade, which currently appears to be leveling off, has been attributed to the high cost of special education and to the increasing proportion of students so classified. Daniel Tanner, *A Nation Truly at Risk*, 75 *PHI DELTA KAPPAN* 288, 293 (1993). School district leaders continue to complain about the costs of complying with the requirements of the IDEA and related statutes. See, e.g., *Inquiry of Larry Craig*, 20 *IDELR* 535 (1993).

68. See, e.g., *Amann v. Town of Stow*, 991 F.2d 929, 932 (1st Cir. 1993).

69. See, e.g., *Timothy W. v. Rochester, New Hampshire, Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (1989).

distrust, hostility, and seemingly unending transaction costs.<sup>70</sup> The five parts of this proposal are illustrative, rather than exhaustive; any additions or alternatives are welcome so long as they provide for more efficient and effective dispute resolution for the education of students with disabilities.

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70. The only virtue of the present system is the possible deterrent effect that would cause parties to arrive at settlements. The problem with such a narrow view is that the way to improve the "virtue" of the system is to make it even more onerous and evil.