

It's Time for an Alternative Dispute Resolution Procedure

By S. James Rosenfeld*

TABLE OF CONTENTS

I. INTRODUCTION	362
II. PROBLEMS WITH CURRENT MECHANISMS	365
III. SYSTEMIC OBJECTIVES OF ARBITRATION	368
A. <i>Consent to Arbitration Must be Explicit, Voluntary, and Fully Informed</i>	369
B. <i>The Arbitration Decision Must Be Final and Binding</i>	371
C. <i>The Arbitration Decision Should Be Issued Within Thirty School Days From Assignment of the Arbitration Request to an Arbitration Panel</i>	373
D. <i>The Arbitration Decision Should Be Specific and Directly Enforceable by the State Education Agency</i>	374
E. <i>The Record of the Arbitration Proceeding Should Be Minimal and Confidential as a Matter of Law</i>	375
F. <i>Counsel Should Be Present During the Arbitration Proceeding Only at the Option of the Parties</i>	376
G. <i>The Arbitrators Should Have Complete Discretion to Prescribe the Formality of and Procedures for the Proceeding</i>	376
H. <i>The Arbitrators Should Have an Affirmative Obligation to Develop the Record and Should Be Authorized to Undertake Any Steps Necessary To Do So</i>	377
I. <i>The Arbitrators Should Consist of a Three-Person Panel: One Expert in the Child's Primary Disability; One Special Educator with Experience in Administering or Providing Educational Programs to Children Identified with the Child's Primary Disability; and One Attorney Familiar with the State's Special Education Laws and Dispute Resolution Procedures</i>	378
IV. RELATED ISSUES TO BE ADDRESSED.....	381
V. CONCLUSIONS AND RECOMMENDATIONS: TEST THE PROCESS	383

I. INTRODUCTION

The warp and woof of the Individuals with Disabilities Education Act¹ (IDEA) is participation, discussion and compromise, and, hopefully, agreement. From the outset, the entire educational process—notification, independent education program (IEP) meeting(s), mediation, and facilitation—provides numerous opportunities for parents and schools to find common ground. If and when these processes do not succeed and a “final” decision is necessary or desired, the due process procedures encourage agreement during mediation and resolution sessions.

Given this environment, urging the addition of arbitration to the dispute resolution procedures might appear to be oxymoronic. Arbitration is almost the antithesis of participation, discussion and compromise, but the availability of arbitration as suggested below would add two improvements to the IDEA dispute resolution system that experience shows are sorely needed: a more balanced “access to justice” and swift and final decisions (at least for a while²). Both of these improvements would be of material benefit to the person who is supposed to be the focus of the process: the child.

* Distinguished Practitioner in Residence, Seattle University School of Law. Professor Rosenfeld joined the Law School in September 2001; he supervised the Special Education Clinical program and established the National Academy of IDEA Administrative Law Judges and Hearing Officers, which has trained special education hearing officers from over 25 states. In June 2009, he became Director of Education Law Programs. He currently serves as Chair of the Special Education Section of the National Association of Administrative Law Judiciary (NAALJ). Prior to joining the Law School, he founded and, for five years, served as Executive Director of COPAA (The Council of Parent Attorneys and Advocates), a private, non-profit organization established to improve the quality and increase the quantity of legal resources for parents of children with disabilities. In April 2002, he was invited to testify before the President’s Commission on Excellence in Special Education, which accepted his proposal to establish a system of arbitration for special education.

¹ 20 U.S.C. 1401, *et seq.* (2012).

² Given a child’s changing needs, not to mention the statutory mandate to reconsider them annually, no decision concerning special education programming can be final once and for all. This point is discussed further below.

When first proposed a decade ago, the addition of an arbitration option to IDEA received, what can only be charitably called, a “mixed” reception.³ Since that time, the inequity of due process hearings has grown;⁴ and, particularly, as I have had the privilege of listening to how hearing officers from across the nation approach due process hearings,⁵ I am persuaded that adding

³ The suggestion was included almost as an afterthought to prepared testimony before the President’s Commission on Excellence in Special Education:

There should and must be a wide variety of dispute resolution procedures available for both parents and school districts to use . . . One additional dispute resolution procedure might be voluntary but binding arbitration available only upon the election of both of the parties. I suspect many parents and schools would be willing to waive their rights of appeal from such decisions if they were fair, impartial and fast.

U.S. Department of Education Office of Special Education and Rehabilitative Services, President’s Special Commission on Excellence in Special Education, Dept. of Educ., *A New Era: Revitalizing Special Education for Children and Their Families* 41 (2002) (quoting Transcript of Commission Meeting Held in San Diego, CA at 141), available at <http://education.ucf.edu/mirc/Research/President's%20Commission%20on%20Excellence%20in%20Special%20Education.pdf>.

The Commission agreed, and recommended that IDEA permit creation of voluntary binding arbitration systems. *See id.* So, apparently, did the U.S. House of Representatives, which included it in the bill it reported. But the U.S. Senate did not and the provision was omitted in the final compromise bill. My understanding is that opposition came primarily from the parent community, which was not surprising given the absence of explanation of how arbitration might work.

⁴ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598 (2001) (recovery of attorneys’ fees); *Schaffer v. Weast*, 546 U.S. 49 (2005) (burden of proof in due process hearings); *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006) (recovery of experts’ fees).

⁵ This has occurred over the last ten years at the National Academy of IDEA Administrative Law Judges and Impartial Hearing Officers, located at the Seattle University School of Law, which drew hundreds of special education hearing officers from approximately half of the states. *See IDEA ALJ/HO Academy*, SEATTLE UNIVERSITY SCHOOL OF LAW, http://www.law.seattleu.edu/Continuing_Legal_Education/IDEA_ALJHO_Academy.xml (last visited Nov. 17, 2012). Also, it has occurred during the last four years at seven trainings for the California Office of Administrative Hearings, which are organized and conducted by the National Academy for California’s special education hearing officers (ALJs) and mediators. *Id.* Discussions in both of these

arbitration as a dispute resolution option will better coincide with the needs of a significant number of participants in the IDEA process.

Therefore, what follows is not intended to be a classic law review article, or even a thorough and complete proposal. Rather, my objective is to briefly note existing problems of the dispute resolution procedures, outline the major components of an arbitration system, make some suggestions on how to implement some of those components and call for further suggestions where more thought is required. It is, in other words, a snapshot of the current status of the proposal,⁶ reflecting development at the time of the Pepperdine symposium presentation,⁷ as well as recent discussions with parents, education agency personnel, attorneys who represent both, and local state and Federal level administrators and regulators.⁸

forums can be quite candid, as they are open only to currently sitting hearing officers. *Id.*

⁶ About ten years ago, per the request of the Office of Special Education Programs of developing an arbitration proposal, I informally conducted a discussion group of persons with extensive experience in various aspects of special education dispute resolution. While the discussion group agreed that any new process must be voluntary, informal, and expedited, the group disagreed about many other aspects. Indeed, most of the participants believed that an additional dispute resolution process was neither necessary nor desirable. They preferred, instead, that changes be made in the existing dispute resolution methods, such as due process and mediation. And while there was widespread agreement that due process had become too cumbersome, expensive, and time consuming, there was very little agreement on how these problems might be remedied.

I suggest that most of these misgivings arise from two fundamental concerns: (1) an unwillingness to forego the protections afforded by current law, even though they may not be available to many of those affected, and (2) the difficulty in evaluating the process outside of traditional legal practices. The first concern is important in assuring and specifying the quality of a new dispute resolution system since it would be unreasonable to expect parents to consent to a process that can promise no better results for their child and would be arbitrary to boot. For this reason, it must be beyond question that parental consent to arbitration is both fully informed and voluntary, and that the decision makers are truly independent and knowledgeable. These are discussed further below, *see infra* Part III.

⁷ Special Education Law Symposium: Examining the IDEA in Theory and Practice at Pepperdine University School of Law (Feb. 10, 2012).

⁸ A similar presentation, *The Case for Voluntary Binding Arbitration: It's Not What You Think*, was made by the author at CADRE's 5th National Symposium on Dispute Resolution in Special Education in Eugene, OR (Oct. 26, 2011). Further, I have had numerous information discussions with attorneys

II. PROBLEMS WITH CURRENT MECHANISMS

Current dispute resolution mechanisms satisfy few, if any, problems of the parties involved.⁹ While mediation may appear to be more favorable than due process hearings since most disputes are now resolved through mediation, accurately gauging public preference is far more complicated. Further, few would quarrel with the proposition that anyone has a good view of due process hearings—including many of the people who conduct them.¹⁰

But it is probably true that mediation at least offers a better chance of addressing and ameliorating the emotional divide that has arisen between parents and school personnel.¹¹ Even so, the variations in how mediations are conducted, who conducts them, why and how the parties engage in the process, pre-existing expectations, and (most importantly) outcomes clearly indicate that results leave much to be desired.¹² Therefore, it is difficult to avoid the

representing education agencies and schools, education agency personnel and teachers, and parents and parent groups.

⁹ It is important to distinguish between the *procedures* set forth in IDEA to encourage parent participation in objective identification, testing and assessment of children with disabilities, from the *dispute resolution mechanisms* themselves, primarily mediation (of various types) and due process hearings.

¹⁰ My experience, after listening to private informal discussions of the hearing process for over ten years by hundreds of hearing officers (both administrative law judges and contract hearing officers) from across the nation, indicates that while the large majority of special education hearing officers are dedicated to doing the best job they can, many officers are as frustrated by the inequity of the proceedings since the parents appear *pro se* and have the limitations imposed by the process, and what most perceive as the narrow focus of their role. A persistent concern has been the lack of specific authority or guidance at the federal level, leaving *pro se* parents with no alternative but to rely on state law, which is too often inapposite, at best.

¹¹ Even mediation is intended primarily to facilitate settlement, not to determine who is “right.” Steve S. Goldberg, *Special Education Mediation: Responding to a Proposal for Reform*, 30 J.L. & EDUC. 127 (2001). This may be important for future relations of the parent(s) and the school personnel, but it is a clear indication that the child’s interests are somewhat secondary.

¹² In reviewing requests for *pro bono* representation by our law school clinic over a period of four years, I was amazed at how many applicants submitted mediation settlement agreements that were so imprecise as to be rendered unenforceable. Many parents frankly admitted that they did not know when they

conclusion, that mediation is often perceived as a “poor man’s” alternative to a due process hearing, a settlement for the best that can be obtained in the absence of legal representation.

This is not to say that due process hearings are more satisfying. Perhaps the most revealing concise characterization of how due process hearings are perceived is the title of chapter 10 of the Fordham Foundation Report: *Nasty, Brutish . . . and Often Not Very Short*—identified as *The Attorney Perspective on Due Process*.¹³ [Emphasis supplied.] If that title can be said to accurately represent the view of those who have only professional involvement in the process (and those who may reap substantial financial benefit from it), it does not take much imagination to opine what the participants think. Most education agency personnel such as teachers, related service providers, and administrative personnel are trained to collaborate, and view the adversarial atmosphere of a due process hearing as a nightmare. Supervisory personnel are somewhat more objective because of their greater experience. However, supervisory personnel still find the demands of a due process hearing as an expensive and negative “drag” on their primary goal of administering an educational program. Therefore, both groups view the procedural (legal) focus of the process as mostly irrelevant to what they are supposed to be doing.

Further, the overwhelming majority of parents see themselves as “David against Goliath”—whether assayed from emotional, knowledge or resource viewpoints.¹⁴ There has been a long-standing consensus that very few, if any, disputes (even a divorce) involve greater emotional tension than a parents’ desires and attempts to secure adequate educational programs and services for their child. Similarly, even though most reasonably sophisticated parents may have a well-grounded and practical knowledge of what it takes to navigate the current special education system, only the “one percent”

signed the agreement, or that they believed the school district would make a broad good faith effort to reach objectives discussed in the course of the mediation, but not explicitly stated in the agreement.

¹³ Lanigan, Audette, Dreier and Kobersy, *Rethinking Special Education for a New Century* 213 (2001).

¹⁴ Most of this is due to the problem that the large majority of parents are either unable to locate or afford counsel. While this problem is not unique to special education, the fact that the dispute concerns children with disabilities seems even more unjust.

can be confident that they have the financial resources to both obtain and retain the necessary expertise.

The playing field was tilted even further during the last decade by three United States Supreme Court decisions concerning the criteria for the recovery of attorneys' fees, the allocation of the burden of proof in due process hearings, and the recovery of fees for experts. First, *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health & Human Services*,¹⁵ a case involving the Fair Housing Amendments Act and the Americans with Disabilities Act (ADA), held that parties are entitled to the recovery of attorneys' fees when they prevail on the merits of their claims by receiving "at least some relief," which can be even nominal damages.¹⁶ That ruling has uniformly been held to apply to IDEA's fee provisions. *Schaffer v. Weast*¹⁷ held that the party who files the request for due process has the burden of persuasion at the hearing; in practice, that is almost always the parents.¹⁸ *Arlington Central School District Board of Education v. Murphy*¹⁹ held that section 1415(i)(3)(B) of IDEA does not authorize prevailing parents to recover expert fees even though the parents prevailed on the merits of the claim because of the importance of expert testimony in an overwhelming majority of IDEA cases.²⁰ Therefore, even if the parents are successful, complaining parents must find a way to secure expert witnesses without the expectation of being reimbursed for expert fees even if they are successful. In combination, these three rulings have proved that there is almost an insurmountable barrier to successful pursuit of due process and the civil litigation that follows.

In addition, there are problems regarding the time required to exhaust the legal process. For many, if not most, a final decision will come well past the time it can be of any benefit to the most important party: the student. A frequent consequence is that, over time, the dispute tends to become more focused on the needs, desires, and frustrations of the parties, as opposed to the educational needs of the

¹⁵ 532 U.S. 598 (2001).

¹⁶ *See id.* at 603–04.

¹⁷ 546 U.S. 49 (2005).

¹⁸ *See id.* at 62.

¹⁹ 548 U.S. 291 (2006).

²⁰ *See id.* at 293–94; *see also* 20 U.S.C. § 1415(i)(3)(B) (2006).

child.²¹ And the hearing process, itself, has some serious defects. Many hearing officers are faced with the obligation to decide between proposals that they are not well trained to evaluate. Moreover, because of fears of being perceived as partial, many believe themselves handcuffed in asking for or requiring additional information from either of the parties that they suspect may be important, if not crucial, in deciding the case before them.²²

III. SYSTEMIC OBJECTIVES OF ARBITRATION

As proposed below, the option of arbitration would correct many of these problems. Perhaps most important, by eliminating the need for attorneys it would create the basic equity of process that Congress presumably intended. This should also reduce the adversarial atmosphere of the proceeding.²³ Equally important, there would be a much shorter timeline for decision and implementation; and, in most disputes, the focus would clearly be on the student's educational program, thereby enhancing the student benefit that underlies the purpose of the statute. The expertise of the decision-making body would be increased by vesting responsibility in a panel consisting of a disability expert, an educator, and a lawyer. And, finally, by virtue of a combination of all these factors—shorter decision timeline, greater expertise, better focused objective and less “legal maneuvering”—the overall costs of dispute resolution should be reduced.

²¹ Not surprisingly, parents tend to take school disagreements personally. According to the parents, school personnel (and their counsel) often cite the “problem” of setting a precedent as a reason for not agreeing to provide what otherwise appears to be an appropriate program for the specific child in front of them, apparently overlooking or ignoring the individualized focus of IDEA.

²² Perhaps the best illustration of this is the fact that section 300.502(d), authorizing hearing officers to request (on their own motion) an independent educational evaluation (IEE) as part of the hearing, is essentially a dead letter. Of the hundreds of hearing officers who have attended the Academy in Seattle over ten years, only two officers requested an IEE on this authority. A frequent explanation for failure to do so is the concern about an officer not appearing impartial. This reluctance to “develop the record” is also particularly surprising given the general perception that a special education due process hearing is usually considered to be a “somewhat less than formal” administrative proceeding.

²³ Or, if not eliminate due process hearings, at least transfer it to the arbitrators, which might be a considerable benefit.

The following section provides a more detailed identification and discussion of the various factors that would be incorporated into the arbitration model and how those incorporated factors would function. To be clear, where substantial questions remain, some of the possible alternatives are identified. None of this is meant to be exhaustive; to the contrary, it is set forth in the hope and expectation that others can and will identify oversights and make additional suggestions.

A. Consent to Arbitration Must be Explicit, Voluntary, and Fully Informed

Consent to arbitration must be fully informed and completely voluntary. This is fundamental for both equitable and practical reasons, and cannot be too strongly emphasized. Given the nature of special education disputes, there is little likelihood that such a proposal would be utilized if either of the parties, but especially the parents, did not have complete confidence that they understood what they were gaining and giving up. Equally important for many, or even most, parents, a full understanding of the arbitration process is likely to enhance its attractiveness.²⁴ It is also a crucial factor in establishing the finality of the arbitration proceeding.²⁵

Thus, the more difficult question is how to assure that the consent is fully informed and voluntary. A common method of providing that assurance under our legal system has been to rely on the support and advice of counsel. But, as noted above, one of the chief objectives of the proposal is to remediate the inability of the parents to secure or retain counsel. It should be clear that, given the importance of assuring that any consent is truly informed and voluntary, simply making written materials available and explaining the “pluses and minuses” of consenting to arbitration does not satisfy the required standard.²⁶ Nor do written materials allow the

²⁴ This is not just a supposition. In explaining to many parents what I had in mind beyond the basic concept of arbitration, the large majority became more receptive to the concept the more they heard about it.

²⁵ See *infra* Part III.B.

²⁶ This is apparent to anyone who has tried to draft a “plain English” document about anything but the simplest legal procedure, which is not how IDEA procedures have been traditionally described. More to the point, one can point to

opportunity for questions and explanations that should underlay truly informed consent.

For the foregoing reasons, it seems necessary to provide some limited access to an independent person whose obligation, broadly speaking, would be to explain the IDEA procedural options and the consequences of submitting to a voluntary binding process. To minimize the cost and burden, a general written explanation should be prepared²⁷ that would include the major points to be conveyed and common questions, as well as initial responses and explanations. The independent person would be responsible for walking the parent(s) through the written explanation, responding to questions and explaining variations in state practice and procedure in state terminology. Although I have no data to support an estimate of how long this might take, my “educated” guess would be an average of no more than three hours.

This function could be performed by a number of possibilities, none of which is clearly superior or exclusive. Perhaps the most obvious would be specially trained employees of state protection and advocacy agencies and other state and local advocacy organizations. Another possibility would be law school clinical programs. And, I would not exclude attorneys in private practice, provided that their activities were carefully limited and reasonably compensated.²⁸ But, it should be clear that any attorney who performs this task with Parent A is thereafter unable to represent Parent A in any capacity in a proceeding arising from that consultation.

the written copies of IDEA’s procedural safeguards liberally distributed by most school districts and ignored as incomprehensible by most parents.

²⁷ It remains to be determined who would prepare the basic written document and make the determination that the document satisfies its intended purpose. This is discussed further, *infra* Part IV, at “*Related Issues to Be Addressed*.” However, historical experience recommends that this decision not be made by existing federal or state level regulatory agencies, neither of which tends to be artful in providing simple, readable explanations.

²⁸ The limitations would be carefully spelled out in the package that contained the general written explanations. Funding might be supervised and provided by state bar associations as a method of satisfying common *pro bono* obligations. Thus, for example, an attorney, whether in public or private practice would request to be added to a roster of available persons and agree to a maximum compensation of three hours at a rate established by the state bar equal to a pre-determined average hourly rate for the state.

In addition to the customary information concerning IDEA rights and procedures, however, there should be explicit statements concerning the conduct, scope, and authority of the arbitration panel. These should include notification and explanation of the following:

- a) that no attorneys, whether as counsel or participant, can be present in the arbitration proceeding unless the parent explicitly consents or is represented by counsel;
- b) that rules for conduct of the proceeding shall be set at the complete discretion of the arbitration panel;
- c) that the arbitration panel has complete discretion to determine the nature and scope of the evidence (witnesses and documents) it will seek or hear;
- d) that the record of the proceeding will be confidential and that substantive challenges to the decision can be heard only by the arbitration panel, itself;
- e) that both parties consent to implement and abide by the decision of the arbitration panel, within any specified timelines within five working days from issuance of the arbitration decision, or post a bond in the amount set by the panel.

B. The Arbitration Decision Must Be Final and Binding

At first blush, this requirement might appear to be obvious, as many arbitration proceedings are undertaken as final and binding.²⁹

29

The very purpose of contractual arbitration is to avoid the courts. Therefore, the courts have long held that there is no right of appeal from an arbitrator's award; any decision is final and binding. The only exceptions are where the arbitrator clearly exceeds his authority or had a conflict of interest.

Adam Morris, *Supremes Open Small Window to Arbitration Appeal*, AARON MORRIS' BUSINESS LAW ALERT (Sept. 7, 2008) <http://www.businesslawalert.com/2008/09/articles/employment/the-supremes-open-small-window-to-arbitration-appeals/>. The article discusses a then-recent decision by the California Supreme Court recognizing the right to appeal an arbitration award where the arbitration agreement provided that "the arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any

But there are serious and legitimate public policy and juridical concerns about placing insuperable bars to appeals of arbitration proceedings.³⁰ By contrast, the importance of the finality of a special education arbitration proceeding is difficult to understate. Parents who agree to arbitration will most likely view it as a way around their inability to locate or afford counsel,³¹ as is intended. However, there would be no reason to do so, if following the arbitration proceeding, the education agency could easily appeal the outcome to a traditional civil litigation forum. For this reason alone, consideration must be given to making appeal of the arbitration proceeding as difficult as possible.³²

However, there is also another reason, only somewhat less important. If an arbitration proceeding can be appealed, even with some difficulty, the likelihood is that those losing education agencies will appeal. In this scenario, therefore, the arbitration proceeding becomes just another costly litigation hurdle to be endured. Consequently, that possibility substantially undercuts the contention that the availability of arbitration can reduce the costs of dispute resolution on a systemic basis. To state the obvious: less litigation, less cost.

such error." *Id.* (quoting *Cable Connections, Inc. v. DirecTV, Inc.* 44 Cal. 4th 1334, 1340 (2008)).

³⁰

There exists a clear tension concerning the finality of arbitral awards. On the one hand, one of the principal benefits of arbitration is, or at least used to be, that generally the award is final and binding upon the parties. Arbitration can thus be a relatively quick and efficient way to resolve a dispute. On the other hand, as arbitrators are asked to interpret more complex legal issues, that same finality is increasingly felt as the absence of much needed quality control over arbitrators.

Eric Van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157, 160 (2003). Consideration of these questions is beyond the scope of this article.

³¹ Obviously, there may be other reasons: the near certainty of a quick decision and, perhaps more important, the expectation that an arbitration proceeding will focus on their child's educational needs, as opposed to procedural considerations.

³² This might not be as easy as it sounds, as courts have jealously guarded their authority as protectors of due process. But it re-emphasizes the importance of voluntary, fully informed disclosure and the document described in Part III.A.

None of this reduces the difficulty of precluding judicial review of an arbitration order.³³ One possibility strongly resisted by both attorneys and existing decision-makers is limiting the circumstances of creation, the scope, and the retention period of the arbitration record.³⁴ Another option might be requiring the appealing party to post a substantial bond, recoverable only if the appeal is successful.³⁵ This option appears to be less drastic, but also less equitable. After all, if a party can afford to challenge the decision, e.g., retaining counsel to do so, presumably posting the bond becomes just another cost.³⁶

C. The Arbitration Decision Should Be Issued Within Thirty School Days From Assignment of the Arbitration Request to an Arbitration Panel

The general objective should be to begin and complete the arbitration proceeding as quickly as possible. IDEA regulations require a due process hearing decision within forty-five days,³⁷ but only after expiration or waiver of the resolution process, which can take thirty days. Moreover, the forty-five day timeline can be extended by the hearing officer “at the request of either party,”³⁸ a not infrequent occurrence.³⁹ Even so, there is a wide spectrum of

³³ There are also questions about whether and, if so, when it should be possible to withdraw from an arbitration proceeding once it has begun. These remain to be addressed.

³⁴ For example, while it may be desirable, even necessary, to have a transcript or video or audio recording for the limited purpose of enabling the arbitrators to prepare a decision, one possibility might be destroying any record once the decision is reached, but before it is issued to the parties.

³⁵ This could be prescribed in the arbitration order, where the amount of the bond could be set on a case-by-case basis and adjusted to reflect the financial capabilities of the respective parties.

³⁶ One way of addressing this potential inequity would be to require the arbitration panel, itself, to set the amount of the appeal bond for each party, with recognition that a higher bond can be required of education agencies.

³⁷ 34 C.F.R. § 300.515(b) (2012) (timelines and convenience of hearings and reviews).

³⁸ 34 C.F.R. § 300.515(c) (2012).

³⁹ Adherence to the forty-five day timeline is one of the few hearing objectives monitored by the Office of Special Education Programs, probably because it provides one of the few “objective” criteria of the hearing process.

opinion about how faithfully the timeline is followed and, depending upon one's position in a specific proceeding, whether strict adherence to the timeline is beneficial or not.⁴⁰

There should be circumstances under which the decision timeline can be more than thirty days, but these should be extremely limited and generally agreed to at the outset of the arbitration. To enable this result, the arbitrators would be vested with broad authority in the conduct of the proceeding, as discussed below.⁴¹ This should follow from recognition of the fact that most delays in dispute resolution proceedings result from inconvenience.⁴² The arbitrators should be empowered to require expedition of any subsidiary process needed to complete the proceeding.⁴³

D. The Arbitration Decision Should Be Specific and Directly Enforceable by the State Education Agency

One of the widespread, recurring problems with mediation agreements and due process hearing decisions is figuring out what to do with them after they are issued. Even putting aside the wide variation in their form and content, the mediation agreements and hearing decisions tend not to be very specific within their four corners; for example, they often do not spell out precisely what must be done. Additionally, there tends to be substantial disagreement about whether they are being properly implemented, and enforceable.

If a procedure is intended to resolve disputes, it should do so. The arbitration decision should be a quasi-IEP,⁴⁴ for example, the

⁴⁰ If dissatisfaction with a rule can be a measure of its effectiveness, the forty-five day timeline is probably a success. The attitude of a party (parent or school attorney) varies depending upon the particular hearing, but special education hearing officers almost uniformly object to the lack of flexibility imposed by the timeline. Their reasons vary widely, ranging from caseload overload to obstruction from the parties to case complexity.

⁴¹ See *infra* Part III.G.

⁴² On the attorneys' side, this could be heavy calendars over which they sometimes have little control; on the educators' side, this could be custom and contractual agreements concerning working hours and vacations. There appears to be wide variation among states in dealing with this kind of problem.

⁴³ As I have heard at least one hearing officer to have observed: "That's what a subpoena is for!"

⁴⁴ A good IEP, obviously.

decision should clearly identify the short-term goals, spell out any necessary programs, services to be provided, by whom, their duration, who is responsible for assuring the provision of the programs and services, and how and when they are to be monitored. If possible, the description of the program and service provider should identify the specific education agency personnel (if they are the providers) or the specific outside program or service providers, at least by organization.

The arbitration procedures should also provide that complaints about the enforceability of the decision should be filed with the state education agency (SEA) and that the SEA be required to assure compliance within fifteen calendar days⁴⁵ from the filing of the complaint. Any such complaints should be limited to whether the arbitration order has been, or is being, implemented and, if not, why. The SEA should not be able to review any other substantive or procedural aspect of the arbitration decision or order, *e.g.*, that the arbitration decision or order was inappropriate.

E. The Record of the Arbitration Proceeding Should Be Minimal and Confidential as a Matter of Law

The concept of minimizing the formal record of a decision-making proceeding is likely to be extremely controversial, even as its underlying purpose—minimizing appeals—may be viewed favorably. However, the historical record concerning other types of arbitration reveals a fertile ground for subsequent challenges concerning procedural (due process) matters. In truth, it is impossible to insulate any arbitration proceeding from all such challenges, however worthy the goal. On the other hand, an extensive formal record will just provide a larger, probably easier, target. Accordingly, it seems only logical to specify that the formal record be minimal and confidential as a matter of law. Precisely what this might be is one of those matters that require further consideration.

⁴⁵ The short period (*e.g.*, 15 calendar days vs. 15 school days) seems justified given the fact that the education agency was well aware of its obligation.

*F. Counsel Should Be Present During the Arbitration Proceeding
Only at the Option of the Parties*

Inasmuch as one of the primary objectives of this procedure is to redress the inherent inequity of unrepresented parents, those parents should be able to veto the presence of an attorney for the education agency. This includes both an attorney, as representative, and any education agency personnel who happen to be attorneys. Thus, no attorneys would be present, in any capacity, unless the parents either (1) are themselves represented by counsel or (2) do not object to the participation of education agency counsel. This decision would be made at the time the parents provide their informed consent to participate in the process and would be verified by the arbitrators.

To be clear, during the arbitration proceeding, the parents would continue to have the option of being accompanied by a support person of their choice, whether or not they veto the presence of education agency counsel. The purpose is to enable any emotional support that may be helpful in the conduct of the proceeding. However, this person could not be an attorney or a non-attorney (lay) advocate.

*G. The Arbitrators Should Have Complete Discretion to Prescribe
the Formality of and Procedures for the Proceeding*

The arbitration proceeding has the best chance of achieving its procedural and substantive objectives if the arbitrators are provided maximum flexibility in ordering and conducting the proceedings.⁴⁶ However, there can be considerable differences concerning exactly what this means. One approach could be specification of changes within existing formal procedural rules, such as relaxation of rules of evidence. Another would be to vest the arbitrators with more extensive authority, such as ordering extensive pre-hearing consultations and the ability to limit the time for presentation and volume of evidence.

To achieve both the broad goals and specific objectives contemplated by this procedure within the strict timeline given, and

⁴⁶ This approach was agreed to even by those who did not favor arbitration in my original consultations ten years ago, *see supra* note 6 and accompanying text.

to minimize appeals of the arbitration decision based on denial of due process, the arbitrators should be provided explicit maximum flexibility to prescribe and control all aspects of the proceeding.⁴⁷ This would include setting various timelines, conducting pre-hearing conferences intended to identify and assure production of necessary documents and appearances of witnesses, and choosing and explaining how the proceeding will be conducted (*e.g.*, the extent to which, if any, counsel will be directly participating, how objections will be handled, etc.).

Perhaps most significantly, it should also include the ability to consider issues beyond those specifically stated by the parties in the request for arbitration. There are two chief reasons for this. The first is to preclude the parties from seeking, within the short-term, repeated arbitrations each confined to one or more narrow issues. The second is to enable the arbitrators to resolve questions reasonably related, in their judgment, to the issue(s) identified by the parties.⁴⁸

Finally, to enable the arbitrators to implement their procedures, the panel should be vested with subpoena power. The enabling legislation should also provide for an expedited appeal process to resolve challenges to any subpoenas.

H. The Arbitrators Should Have an Affirmative Obligation to Develop the Record and Should Be Authorized to Undertake Any Steps Necessary To Do So

Under our adversarial system, responsibility for development and presentation of the record (facts and legal arguments) is the responsibility of the parties, specifically the attorneys representing the parties. The attorneys are presumed to know what types of evidence the decision maker can and will consider as a matter of law. That is the chief reason why having legal representation is so important. If, as is proposed here, a central objective is to reduce this reliance upon attorneys, how will the record be developed?

⁴⁷ Explicit recognition of, and consent to, this authority should be one of the items set forth in the signed consent to the arbitration process, as noted in Part III.A.

⁴⁸ Needless to say, whether, and how, this authority can be reasonably proscribed requires further consideration.

One approach would be to simply let the parties present whatever evidence each believes is important. Essentially, this is what happens when a party appears *pro se*—and it is strongly disfavored by virtually all decision makers. The more obvious reasons: crucial evidence may not be offered, too much irrelevant information may be provided, and proceedings are unnecessarily lengthened.

A more efficient approach, the one urged here, is to place responsibility for development of the record on the arbitrators, themselves. Essentially, this is what occurs in European civil law systems, where the decision makers are expected to assume an active role in the process—questioning witnesses and framing or reformulating issues, as part of their responsibility.⁴⁹ The arbitrators would be expected to assume the controlling role in the process—framing or reformulating issues, identifying, calling and questioning witnesses and requesting documents—as part of their responsibility. Although the parties and counsel, if present, could be permitted to submit questions, interrogation actually would be conducted by the members of the panel. In addition, the arbitrators would have the authority—and be expected—to request and secure any additional information they believe necessary to reach the correct decision. This would include the authority to call expert witnesses and secure additional evaluations.⁵⁰

I. The Arbitrators Should Consist of a Three-Person Panel: One Expert in the Child's Primary Disability; One Special Educator with Experience in Administering or Providing Educational Programs to Children Identified with the Child's Primary Disability; and One Attorney Familiar with the State's Special Education Laws and Dispute Resolution Procedures

Given the expertise required of, and the authority entrusted to, the arbitrators, it should be obvious that it is absolutely crucial that

⁴⁹ It has been suggested that the main difference between continental and American litigators is that the former are mostly “law adversaries” while the latter are “law-and-fact adversaries.”

⁵⁰ This should clarify an apparently widespread existing reluctance for impartial hearing officers to request evaluations on their own motion, despite express authority to do so under existing IDEA regulations, § 300.502(d).

they be completely independent of both parties, focused solely on the needs of the child, and highly knowledgeable (or have access to such independent knowledge) about special education. It should be fairly easy to assure impartiality of the arbitrators by either creating or adapting one or more existing codes of ethics used by the judiciary, the bar, or other professional organizations.⁵¹ More difficult are questions concerning the number and background of the decision makers and their method of selection.

Resolution of these questions usually turns on consideration and balancing of two factors: the parties' confidence in the integrity of the decision makers and the parties' respect for their knowledge and expertise. Both are important in encouraging the parties to utilize the process, but there does not appear to be any objective criteria or clinical data clearly pointing to the significance of one over the other. It could be argued that integrity of the mediators weighs more heavily in mediations, where confidence in the person is especially important to success. While, obviously, a mediator's substantive knowledge concerning the dispute is important, it is not unfair to observe, broadly speaking, that the mediator's primary objective is to assist the parties in reaching a mutually acceptable agreement, and not find "the right answer." In these situations, it makes a great deal of sense to follow the commonly-urged procedure whereby each party selects one person who, between themselves, select a third person, either as a third party or as a single party mediator.

While similar analysis and conclusions could be applicable to due process hearings, there are important differences. For one thing, the objective of a due process hearing is not to find a resolution mutually acceptable to the parties, but to specify a resolution, which may not be acceptable to either party, in whole or in part. Moreover, it could be argued that the substantive objective of the hearing is to find "the right answer": the "right answer" as a matter of law. And it is important to remember that the right answer "as a matter of law" may be very different from the right answer as a "matter of fact."

⁵¹ For example, the Code of Ethics for Arbitrators in Commercial Disputes (usually referred to as the AAA/ABA Code of Ethics) was substantially revised effective March 1, 2004 to make the Code of Ethics virtually identical to the Code of Judicial Conduct.

Within this framework, arbitration is even more different from mediation than is a due process hearing. There is a similarity in that both a due process hearing and arbitration reach a resolution that may not be fully coincident with either of the parties. But the important, perhaps more critical, difference is that the arbitration can reach for the “right answer as a matter of law and fact.”⁵² This may prove to be especially important when it is the interest of a third party, the student, that is being considered.

These factors emphasize the importance of expertise by the decision makers. For these reasons, it is recommended that the arbitration decision be reached by a three member panel consisting of (1) a person with expertise in the child’s primary disability; (2) a special educator with experience in administering or providing educational programs to children identified with the child’s primary disability; and (3) an attorney familiar with the state’s special education laws and dispute resolution procedures. The specific reasons for requiring persons with each of these types of expertise should be obvious; but, as a general matter, it is important to remember that fairly technical and sophisticated problems may be involved, and as experience has shown, all of these types of expertise are rarely found in one person.⁵³

Given the nature of the process, it seems logical to place responsibility for management of the arbitration proceeding in the attorney-member as *primus inter pares*, whose chief responsibilities would be to assure that relevant and sufficient evidence is gathered⁵⁴ to support a decision and that the decision includes specific direction for implementation. Beyond that, the panel members would have equal authority and weight in the conduct of the proceeding, the issues in dispute, the types of information to be gathered for the record, the witnesses to be called, and so forth. These types of decision, including the final decision(s), would be determined by a strict majority vote.

⁵² Is it too much to suggest that being able to find a resolution of a dispute through determination of the “right answer as a matter of law and fact” is most likely to resonate as true justice?

⁵³ In addition, most issues that arise in hearings demand expertise concerning disability and education, not law.

⁵⁴ For example, this would include the issuance of any necessary subpoenas.

IV. RELATED ISSUES TO BE ADDRESSED

There are, of course, a number of questions that need to be addressed and resolved prior to offering arbitration as an additional dispute resolution procedure. Perhaps the most obvious is how the model would be implemented, and specifically, who would be responsible for its administration and monitoring. This question is particularly important because it inevitably includes the issue of how the system is paid for.⁵⁵

Probably the most obvious *locus* for administration is the state education agency, which already has final responsibility for overseeing other special education dispute resolution processes. This would also comport with the earlier suggestion that enforcement of arbitration decisions be undertaken by direct filing with the SEA. But, given the expansive authority of the arbitrators, perceptions of impartiality are even more important concerning arbitration than they are concerning mediation or due process hearings. IDEA has always required that hearings be conducted by impartial hearing officers,⁵⁶ but the early record of implementation of this requirement was spotty, at best, and it is not an exaggeration to note that a significant number of parents, not to mention their attorneys, believe that many due process hearing officers are partial to schools.⁵⁷

For these reasons, other possibilities should be considered, such as bar associations, non-profit advocacy organizations, and law schools (possibly in cooperation with schools of education). Another approach might be to adapt the example of other types of arbitration⁵⁸ by establishing a specialized, independent, non-profit organization whose sole focus would be administration of special education

⁵⁵ This is usually the first question I am asked in presentations, *i.e.*, *Showcasing Exemplary Practices*: CADRE's 5th National Symposium on Dispute Resolution in Special Education, Eugene, OR (Oct. 26, 2011).

⁵⁶ 34 C.F.R. § 300.511(c) (2012) (Impartial due process hearing).

⁵⁷ Consideration of possibilities other than the SEA may be particularly important in states where the SEA is not viewed favorably by parents. This may also be desirable to determine whether and how non-SEA management results in different management, results, and implementation.

⁵⁸ *Cf.*, for example, the Financial Industry Regulatory Authority (FINRA), which deals with customer/broker-dealer disputes.

arbitration on a national basis.⁵⁹ This approach has advantages beyond enhancing impartiality and independence. For one thing, it enables development of the law on a national, rather than a state-by-state, basis, something that has unnecessarily complicated interpretation and implementation of IDEA, which is, after all, a federal statute. From a practical viewpoint, it enables the allocation and assignment of decision makers (arbitrators) on an “as needed” national basis, rather than requiring each state to maintain a minimum corps of hearing officers, many of whom may seldom hear cases.⁶⁰

Closely related are issues concerning the quality and training of the arbitrators. This also bears careful consideration given the history regarding special education hearing officers. It is nothing less than startling to acknowledge that it took more than twenty-five years following adoption of IDEA to define the existing minimum standards for hearing officers.⁶¹ And it is not difficult to argue that, at least from a national perspective, adoption of these standards has resulted in a uniform increase in proficiency.⁶² Every effort should

⁵⁹ This might encompass the entire process, including, for example, drafting the basic informed consent document as I described in Part III.A.

⁶⁰ Perhaps a better analogy would be insurance, where a larger risk pool reduces the per person cost.

⁶¹ 34 C.F.R. § 300.511 (2012).

(c) Impartial hearing officer. (1) At a minimum, a hearing officer . . . (ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts; (iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate standard legal practice; and (iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Id.

⁶² There are many reasons for this, most flowing from what, in this author’s view, are two critical defects: the first is the lack of specificity in the standards, themselves; the second is OSEP’s chronic “hands off” attitude toward monitoring their implementation. It is not be surprising, therefore, to find a wide variation in the type and quality of hearing officer training among the states, an indefensible result given the fact that IDEA is a federal statute.

be made to avoid repetition of this history in creating an arbitration system, particularly as the arbitration orders will be far more “final.”

The additional expense of funding another dispute resolution system is somewhat more problematic, though ultimately it should not be that difficult or controversial. A strong argument can be made that the overall costs of arbitration will be much lower than other dispute resolution procedures and that the availability of an arbitration alternative will reduce the aggregate costs of dispute resolution in special education. Certainly the costs of an arbitration proceeding as outlined above should be less than any comparable due process hearing; to these savings must be added the elimination of costs that would be incurred from appeal of the mediation agreement of the hearing decision. Under this arrangement, the independent, non-profit organization could simply bill the state for the cost of any arbitration arising within that state. Such an approach may be more attractive than might first be evident because it relieves the state of the continuing administrative overhead that would be required if arbitration, like due process, were provided on a state-by-state basis.⁶³

V. CONCLUSIONS AND RECOMMENDATIONS: TEST THE PROCESS

This proposal contemplates a major addition to the existing dispute resolution procedures. However, given the current and long-standing dissatisfaction with both the tenor and quality of the existing due process hearing system, such an effort is justified.⁶⁴ If it is successful, it would reduce inequality in access to legal resources, increase confidence by parents and education agencies in the integrity of the system, reduce direct and indirect costs, focus dispute

⁶³ The organization would also be responsible for maintaining a roster of persons qualified to be arbitrators, training them as necessary, and selecting them essentially on a random basis.

⁶⁴ It would be understandable, but mistaken, to conclude from this article that “due process” has been a failure. To the contrary, the availability of a due process hearing, and subsequent civil litigation, is and continues to be a necessary remedy. But thirty-five years of experience have demonstrated that “due process” suffers many of the problems inherent in our adversarial system—especially its complexity, cost, and delay. The system of arbitration proposed in this article is intended to provide an additional dispute resolution process that avoids most of these problems.

resolution on educational outcome, and minimize disparity in interpretation and application of the law. These are objectives worth such an effort.⁶⁵

Such a substantial change should be tested and tuned before being authorized and adopted on a national basis. Accordingly, it is strongly urged that the United States Department of Education establish a pilot project to test its feasibility. For example, a modest grant administered through a law school, perhaps in cooperation with a school of education, could recruit a number of states to develop and test variations on a voluntary basis. The number of states should be sufficient to reflect many of the variations in results that might be expected because of population size, historical number of due process hearings, structure of due process hearing system, and other possible relevant factors. The trial project should also include variations in the minimum qualifications and experience of the arbitrators.⁶⁶ Data should be compiled for no less than three years; and analysis of results, including legislative recommendations, should be submitted to the Assistant Secretary and available for public examination.

⁶⁵ To be fair, it should be noted that, while existing data appears minimal, previous arbitration efforts have not been successful. Minnesota apparently briefly tried a tentative arbitration program, under which an arbitrator was selected from a state list (unknown who selected the arbitrator), and a binding decision was to be issued within twenty days. Apparently, no arbitration was ever conducted. Iowa was reported to have tried a "hybrid" arbitration system, but no data has been located.

⁶⁶ It might also be worthwhile to test whether the variability in results that inevitably occurs from the existence of fifty different sources of arbitrators could be substantially reduced by having a centralized, uniform source of arbitration personnel. For example, as part of the pilot program, a corps of arbitration personnel could be recruited, trained, and made available to some of the participating states, particularly those with a record of few due process hearings.