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SPECIAL EDUCATION ARBITRATION:
“RIGHTNESS” AS A MATTER OF LAW AND FACT?

By
Stephen S. Worthington*

I. INTRODUCTION

Public school officials in the United States are gearing up¹ for the reauthorization of the Individuals with Disabilities Education Act (“IDEA”).² Refining IDEA’s rules over dispute resolution in special education will be a critical issue as Congress considers amending IDEA.³ The centerpiece of IDEA’s dispute resolution regime, the due process hearing, has become the focus of a vigorous debate among special education scholars and stakeholders. While some commentators criticize due process hearings as unfair, excessively costly, and detrimental to school-parent relationships,⁴ others defend the due process hearing as an effective and essential safeguard of students’ rights.⁵

While IDEA already encourages use of mediation,⁶ critics have argued that special education mediation is plagued with its own shortcomings and does not adequately address the problems raised by due process hearings.⁷ One scholar, Professor

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¹ NATIONAL SCHOOL BOARDS ASSOCIATION, *INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): EARLY PREPARATION FOR REAUTHORIZATION* (August 2014), available at <https://nsba.org/sites/default/files/reports/Issue%20Brief-Individuals%20with%20Disabilities%20Education%20Act.pdf>; SASHA PUDELSKI, AM. ASS’N SCH. ADM’RS, *RETHINKING SPECIAL EDUCATION DUE PROCESS 2* (April 2013) available at http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

² IDEA grew ripe for reauthorization in 2011, but its reauthorization has been delayed along with other key education statutes in a deeply divided Congress. Alyson Klein, *Education Laws Overdue for Renewal Languish in Congress*, EDUC. WK., Jan. 15, 2014, at 1, 19, available at http://www.edweek.org/ew/articles/2014/01/15/17congress_ep.h33.html.

³ Tracy Gershwin Mueller, *Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, J. OF DISABILITY POL’Y STUDIES (Prepublished Aug. 20, 2014), DOI: 10.1177/1044207314533382.

⁴ See S. James Rosenfeld, *It’s Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 544 (2012); Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013); See also PUDELSKI, *supra* note 1.

⁵ Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. DISP. RESOL. 501 (2014).

⁶ 20 U.S.C. § 1415(e) (2014).

⁷ See Cope-Kasten, *supra* note 4; Rosenfeld, *supra* note 4.

S. James Rosenfeld,⁸ has proposed adopting an arbitration alternative for special education disputes.⁹ Noting that due process hearings aim for the right answer as a matter of law regardless of whether the result would be acceptable to either party, Professor Rosenfeld posits that “arbitration can reach for the ‘right answer as a matter of law and fact.’”¹⁰ If successful, Professor Rosenfeld’s arbitration alternative could create a “goldilocks” option for disputants who wish to avoid both the adversary climate of due process hearings and the bargaining disparities of mediation.

This article seeks to extend consideration of Professor Rosenfeld’s proposed arbitration alternative for special education disputes. First, this article will survey the current dispute resolution landscape under IDEA, and then provide an overview of Professor Rosenfeld’s proposal. Pursuant to Professor Rosenfeld’s invitation¹¹ to promote dialogue on his proposal, this article will then explore considerations in designing an arbitration alternative for special education.

II. OVERVIEW OF DISPUTE RESOLUTION IN SPECIAL EDUCATION

IDEA¹² was originally enacted in 1975 as the Education for All Handicapped Children Act, and renamed the Individuals with Disabilities Education Act in 1990.¹³ IDEA provides states with federal funding to educate students with disabilities according to its provisions.¹⁴ Under IDEA, all students with disabilities covered by the Act must be provided a free, appropriate, public education¹⁵ according to an individualized education program.¹⁶ IDEA also provides mechanisms for resolving special education disputes.¹⁷ This section will provide a brief overview of IDEA’s key provisions, and then discuss dispute resolution under IDEA.

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⁹ Rosenfeld, *supra* note 4, at 550.

¹⁰ *Id.* at 563.

¹¹ *Id.* at 552 (proposal “is set forth in the hope and expectation that others can and will identify oversights and make additional suggestions”).

¹² 20 U.S.C. §§ 1400-1482 (2014).

¹³ LAURA ROTHSTEIN & SCOTT F. JOHNSON, SPECIAL EDUCATION LAW 19-20 (5th ed. 2014).

¹⁴ *Id.* at 35-36.

¹⁵ *Id.* at 35; 20 U.S.C. § 1401(9) (2014).

¹⁶ *Id.* at 37; 20 U.S.C. § 1414(d) (2014).

¹⁷ 20 U.S.C. § 1415 (2014).

A. Key Provisions of IDEA

The cornerstone¹⁸ of IDEA is the child's right to a free, appropriate, public education ("FAPE") that is individualized to the student in conformance with state standards.¹⁹ The controlling standard for appropriateness of educational services was set by the Supreme Court in *Board of Education v. Rowley*.²⁰ In *Rowley*, the Court concluded that educational services are appropriate when the services are "individually designed to provide educational benefit" to the student.²¹ Judges and hearing officers applying the *Rowley* standard have followed a pattern of deference to the professional judgment of "school"²² personnel on questions of educational appropriateness.²³ Commentators have generally criticized the *Rowley* standard as flimsy, but Congress and the courts have declined to elevate the standard.²⁴

Schools implement IDEA's FAPE requirements through individualized education programs ("IEPs").²⁵ An IEP is a written plan identifying the student's unique educational needs and the corresponding services the student will receive.²⁶ An IEP must describe the following:

¹⁸ Perry A. Zirkel, *Is it Time for Elevating the Standard for FAPE Under IDEA?*, 79 EXCEPTIONAL CHILDREN 497, 497 (2013).

¹⁹ 20 U.S.C. § 1401(9) (2014).

²⁰ 458 U.S. 176 (1982); *See also* Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J. L. & EDUC. 95 (2012) ("Thirty years old in 2012, *Rowley* remains the Supreme Court's sole pronouncement on the meaning of the duty to provide appropriate education for children with disabilities.").

²¹ *Rowley*, 458 U.S. at 201.

²² This article uses the term "school" as shorthand for "local educational agency," defined under IDEA as a public authority with control over public elementary or secondary education within a political subdivision. 20 U.S.C. § 1401(19)(A) (2014).

²³ Zirkel, *supra* note 18, at 501.

²⁴ *Id.* (surveying scholarly commentary, case law, and legislation arising from *Rowley*); *see also* Cope-Kasten, *supra* note 4, at 522-23 (quoting ALJ's characterization of *Rowley* as "a pretty low bar" which prevents better outcomes).

²⁵ ROTHSTEIN & JOHNSON, *supra* note 13, at 148.

²⁶ *Id.*

1. The student's current academic achievement and how the student's disability affects his or her performance;
2. The student's annual academic and functional goals and how progress toward those goals will be measured and reported;
3. The educational services the student will receive and the schedule for providing those services;
4. The level of inclusion with nondisabled students;
5. Standardized testing accommodations;
6. Goals and services to enable the student to succeed after exiting the education system.²⁷

IEPs are developed by a team that includes educators from the student's school, the student's parents, and (where appropriate) the student.²⁸

B. Existing Dispute Resolution Processes

Occasionally, disputes between parents and schools arise over a student's special education services.²⁹ IDEA provides a range of processes to resolve disputes including due process hearings, mediation, or complaint investigation.³⁰ This subsection will discuss each in turn.

1. Due Process Hearings

Under IDEA, schools or parents may request a due process hearing ("DPH") to resolve disputes.³¹ A DPH is an adversarial proceeding in which an impartial hearing officer issues a decision based on the parties' evidence.³² It features a number of procedural protections, including the right to bring legal counsel, confrontation of witnesses, exclusion of improperly disclosed evidence, and access to a record of the proceeding and decision.³³ DPH disputants must also follow IDEA's notice requirements.³⁴ Parents have additional rights to have the child present, open the hearing

²⁷ 34 CFR § 300.320 (2014).

²⁸ 20 U.S.C. § 1414(d)(1)(B) (2014).

²⁹ ROTHSTEIN & JOHNSON, *supra* note 13, at 246.

³⁰ *Id.* at 246, 259 n.32.

³¹ *Id.* at 246.

³² *Id.*

³³ 34 C.F.R. § 300.512(a) (2014).

³⁴ 20 U.S.C. § 1415(b)(7) (2014).

to the public, and receive a copy of the record and decision at no cost.³⁵ Parents may recover their attorneys' fees if they prevail at the hearing, and schools may recover attorneys' fees if the claim was not pursued in good faith.³⁶ DPH decisions may be appealed to state educational agencies, and then to state or federal court.³⁷

The adversarial nature of DPH has attracted a number of criticisms.³⁸ Although IDEA's due process provisions were intended to resolve disputes "as quickly as practicable,"³⁹ the DPH has gradually become less efficient and more judicialized.⁴⁰ This trend contravenes both students' interest in timely educational services, and schools' interest in cost savings.⁴¹ Because schools come to the proceedings with institutional advantages over parents, the inefficiencies of due process procedures are especially burdensome for parents.⁴²

The DPH can also damage relationships.⁴³ Because the DPH process is designed to pit parents against schools, a DPH may push already strained relationships to the point of no return.⁴⁴ Due process disputants posture themselves to defeat the other party, rather than find a solution, thereby increasing hostilities.⁴⁵ As a result, future disputes between the parent and school can escalate more quickly.⁴⁶ The party bearing the brunt of this deteriorated relationship is the child, who may receive lower quality educational services or be removed from school out of spite.⁴⁷

³⁵ 34 C.F.R. § 300.512(c) (2014).

³⁶ 20 U.S.C. § 1415(i)(3)(B) (2014) (allowing schools to recover attorneys' fees if parents' claims are frivolous, unreasonable, without foundation, or presented for an improper purpose).

³⁷ 20 U.S.C. § 1415(g), -(i) (2014).

³⁸ See *supra* note 4; see also Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

³⁹ 121 Cong. Rec. 37,416 (1975) (statement by Sen. Harrison Williams).

⁴⁰ Zirkel, Karanxha, & D'Angelo, *supra* note 38.

⁴¹ *Id.* at 47-48.

⁴² Rosenfeld, *supra* note 4, at 550 (noting that parents typically bear the burden of persuasion and are barred from recovering expert witness fees); see also Zirkel, *supra* note 18, at 503-05 (illustrating parents' difficulty overcoming hearing officers' deference to schools on questions of educational practice).

⁴³ Cope-Kasten, *supra* note 4, at 514-18.

⁴⁴ *Id.* at 514.

⁴⁵ *Id.* at 516.

⁴⁶ *Id.* at 518.

⁴⁷ Cope-Kasten, *supra* note 4, at 517.

2. Mediation

To address the problems stemming from DPH's shortcomings, Congress amended IDEA in 1997 and 2004 to encourage mediation of special education disputes.⁴⁸ Mediation under IDEA must be voluntary, not used to delay parents' procedural or substantive rights, and conducted by a trained, impartial mediator at no cost to the parties.⁴⁹ States must maintain a roster of qualified mediators.⁵⁰ Mediation discussions under IDEA, if successful, cannot be admitted as evidence in due process or judicial hearings.⁵¹ Mediated agreements are enforceable in state or federal court.⁵²

While mediation is less taxing on the parties' relationship and finances, it suffers from its own disadvantages.⁵³ The structure of special education mediation is more likely to produce mediators who are biased in favor of schools than of parents.⁵⁴ For instance, a Pennsylvania study found that experience in education was valued in those applying to become special education mediators, while experience as a parent of a child with disability was not valued.⁵⁵ Additionally, schools—as institutional, repeat players—have greater familiarity with the mediation process and are more likely to develop relationships with mediators than parents, who are typically one-shot players.⁵⁶

Even if this structural bias were corrected, mediation, by its nature, does little to alleviate bargaining disparities between parents and schools.⁵⁷ Because mediation foregoes procedural safeguards in favor fostering agreement, the process cannot “level

⁴⁸ Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement ACT (IDEIA) of 2004: Where do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L. J. 65, 71-76 (2007).

⁴⁹ 20 U.S.C. § 1415(e)(2)(A), -(D) (2014).

⁵⁰ 20 U.S.C. § 1415(e)(2)(C) (2014).

⁵¹ 20 U.S.C. § 1415(e)(2)(F)(i) (2014).

⁵² 20 U.S.C. § 1415(e)(2)(F)(iii) (2014).

⁵³ Cope-Kasten, *supra* note 4, at 532-37; Rosenfeld, *supra* note 4, at 548-49; *See also infra* notes 55-56.

⁵⁴ *See infra* notes 55-56.

⁵⁵ *See* Nancy A. Welsh, *Stepping Back through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and its Value*, 19 OHIO ST. J. DISP. RESOL. 573, 660 (2004). *See also* Sonja Kerr & Jenai St. Hill, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179, 191-92 (2012).

⁵⁶ *See* Nancy A. Welsh, *What is (Im)partial enough in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 416-27 (2010) (describing the advantages of repeat players and potential partiality of embedded neutrals in the arbitration context).

⁵⁷ Kerr & St. Hill, *supra* note 55, at 181-83.

the playing field.”⁵⁸ Mediators cannot mitigate these disparities by advising parents because such assistance would undermine the mediator’s neutrality and contravene IDEA’s requirement that mediators remain impartial.⁵⁹

3. State Complaint Investigation

State educational agencies are charged with monitoring and enforcing schools’ implementation of IDEA.⁶⁰ So states can fulfill this role, states must provide complaint procedures for any interested party alleging a violation of IDEA.⁶¹ This includes parents seeking enforcement of their child’s special education rights, as well as individuals or advocacy groups seeking to remedy systemic violations.⁶² Upon receiving a complaint, the state must complete an investigation and issue a written decision within sixty days.⁶³ Remedies include facilitating negotiation between the school and complainant, requiring the school to obtain technical assistance in complying with IDEA, and corrective action.⁶⁴ States must treat a DPH decision as binding when making complaint decisions, and may not investigate issues currently being contested in a DPH.⁶⁵

IDEA’s complaint investigation procedures are under-researched.⁶⁶ Studies from the late 1990s indicate that states tend to focus narrowly on IDEA’s procedural requirements in complaint investigations, rather than the substantive requirements of

⁵⁸ Kerr & St. Hill, *supra* note 55, at 181-83.

⁵⁹ *Id.* at 191.

⁶⁰ 20 U.S.C. § 1412(a)(11)(A) (2014); 34 C.F.R. § 300.600(a) (2014).

⁶¹ 34 C.F.R. § 300.151(a) (2014).

⁶² 34 C.F.R. § 300.152(a); *see generally* 4-10C JAMES RAPP, EDUCATION LAW § 10C.04[5][a] (2014), *available from* Lexis Advance (providing overview of state complaint procedures under IDEA).

⁶³ 34 C.F.R. § 300.152(a) (2014).

⁶⁴ 34 C.F.R. § 300.152(b) (2014).

⁶⁵ 34 C.F.R. § 300.152(c) (2014).

⁶⁶ Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Students with Disabilities*, 23 J. OF SPECIAL EDUC. LEADERSHIP 100, 104 (2010) (state complaint procedure “is neither well known nor well understood”); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1425 n.58 (state complaint investigations “remain surprisingly understudied”); Mueller, *supra* note 3, at 3 (“Research about IDEA dispute resolution procedures does not address parent or educator perceptions of the state complaint procedure.”).

FAPE.⁶⁷ That research also suggests that parents who file state complaints rather than DPH requests tend to be poorer, less educated, and less likely to have legal assistance.⁶⁸

III. AN ARBITRATION ALTERNATIVE?

In the commercial context, arbitration is valued for a flexibility that allows disputes to reach equitable and economic resolution without the burden of protracted judicial procedures.⁶⁹ The “less adversarial tenor” of arbitration also helps to preserve business relationships between commercial disputants.⁷⁰ As discussed *supra*, concerns over equity, economy, and preserving relationships are also the primary problems afflicting special education disputes. Arbitration may be a powerful tool for improving dispute resolution in special education.

Professor James Rosenfeld proposes creating such an arbitration option for special education disputes.⁷¹ To insulate arbitrators from the influence of state and local education agencies, Professor Rosenfeld suggests that special education arbitration be administered by independent, non-profit organizations such as bar associations, advocacy organizations, or law schools.⁷² The administering organization would bill state education agencies for arbitration services.⁷³ Professor Rosenfeld contends that adding an arbitration alternative to existing dispute resolution systems would result in substantial cost-savings because disputants who would otherwise choose costly DPH procedures or appeal of mediation decisions would instead opt for the greater economy of arbitration.⁷⁴

⁶⁷ Nicole Suchey & Dixie Snow Huefner, *The State Complaint Procedure Under the Individuals with Disabilities Education Act*, 64 EXCEPTIONAL CHILDREN 529, 535 (1998) (survey of 35 states finding that only 27 of those states investigate substantive issues); Michael J. Opuda, A Comparison of Parents Who Initiated Due Process Hearings and Complaints in Maine 67-68 (Nov. 17, 1997) (Ph.D. dissertation, Virginia Polytechnic Institute and State University), available at ProQuest Dissertations & Theses 9923374 (finding that complaint investigations tended to address procedural issues more often than DPHs).

⁶⁸ Opuda, *supra* note 67, at 54, 58, 71.

⁶⁹ THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 11-12 (6th Ed. 2012); See also LEONARD L. RISKIN, JAMES E. WESTRBOOK, CHRIS GUTHRIE, RICHARD C. REUBEN, JENNIFER ROBBENNOLT, & NANCY A. WELSH, DISPUTE RESOLUTION AND LAWYERS: CASES AND MATERIALS 563 (5th Ed. 2014) (“The underlying reasons that many parties choose arbitration over litigation are the relative capacities for speed, cost savings, and greater efficiency in the arbitral process.”).

⁷⁰ CARBONNEAU, *supra* note 69, at 13. Although arbitration is less adversarial than judicial litigation, arbitration is more adversarial than mediation. RISKIN ET AL., *supra* note 69, at 567-71 (“[A]rbitration is much more akin to litigation than is either negotiation or mediation.”).

⁷¹ Rosenfeld, *supra* note 4.

⁷² *Id.* at 564

⁷³ *Id.* at 566.

⁷⁴ *Id.*

Professor Rosenfeld further suggests that special education arbitration be administered at the national level to achieve economy of scale, resulting in additional cost-savings.⁷⁵

Professor Rosenfeld's proposal has four key features: First, attorneys would be excluded from arbitral proceedings unless the parents allow otherwise; second, the arbitral panel would consist of a disability expert, an educator, and a lawyer to ensure that the panel possesses the necessary expertise to reach a fair decision; third, the panel would issue a final, binding decision resembling an IEP within 30 days of receiving an arbitration request; fourth, parties, notably parents, would only enter arbitration with fully-informed consent. Professor Rosenfeld posits that a "combination of all these factors – shorter decision timeline, greater expertise, better focused objective and less 'legal maneuvering'" will reduce the overall costs of dispute resolution.⁷⁶ These four features, and other important details of Professor Rosenfeld's proposal, are discussed below.

A. Counsel Would Only Be Present In Arbitration With The Parents' Consent.

Under Professor Rosenfeld's proposal, parents could opt to exclude attorneys from arbitral proceedings. Parents would make this decision at the time they submit to arbitration, and the exclusion would apply both to attorneys representing either party and to school personnel who happen to be attorneys.⁷⁷ This feature would narrow power disparities⁷⁸ and help preserve the relationship between the parties by preventing arbitration from assuming an adversarial character.⁷⁹ Because parties would not be represented by counsel, responsibility for developing the record would fall on the arbitrators, similar to European civil law systems.⁸⁰

B. The Arbitration Panel Would Consist Of An Expert In The Child's Disability, A Special Educator, And An Attorney Versed In Special Education Law And Dispute Resolution.

Special education disputes typically involve three areas of expertise that are rarely found in a single person: disability, educational administration, and law.⁸¹ To ensure that

⁷⁵ Rosenfeld, *supra* note 4, at 564-66.

⁷⁶ *Id.* at 551.

⁷⁷ *Id.* at 559.

⁷⁸ *Id.*

⁷⁹ Rosenfeld, *supra* note 4, at 551.

⁸⁰ *Id.* at 561.

⁸¹ *Id.* at 563.

the arbitrators possess the necessary expertise, Professor Rosenfeld proposes that the panel consist of an expert in the child's primary disability, an expert in special education programs germane to that disability, and an attorney familiar with dispute resolution and special education law.⁸² The attorney-arbitrator would assume responsibility for management of the proceedings.⁸³ Other matters, including the final decision itself, would be determined by a majority vote of the arbitration panel.⁸⁴

Consistent with common arbitral procedure, each party would choose one particular arbitrator, and the two party-selected arbitrators would select the third arbitrator.⁸⁵ Although Professor Rosenfeld's proposal does not discuss which parties would select which type of arbitrator, the most equitable arrangement, as discussed *infra*, would provide that parents choose the disability expert, schools choose the attorney, and the disability expert and attorney choose the educator.⁸⁶ To ensure impartiality, Professor Rosenfeld proposes that special education arbitrators adopt a code of ethics modeled on those used by commercial arbitrators, the judiciary, or the bar.⁸⁷

C. A Final, Enforceable Decision In The Form Of An IEP Would Be Issued Within Thirty School Days Of Assignment To An Arbitration Panel.

For special education arbitration to meet its aspirations as both a fair and economical method of resolving disputes, arbitral decisions must be quick, final, and enforceable. Professor Rosenfeld proposes that decisions generally be rendered within thirty school days from assignment of the case to an arbitral panel.⁸⁸ To achieve this expediency, the arbitrators would have "explicit maximum flexibility" to set timelines and procedure for conducting hearings, taking evidence, and issuing subpoenas.⁸⁹

⁸² Rosenfeld, *supra* note 4, at 563.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 562.

⁸⁶ *See infra* Part IV.C.

⁸⁷ Rosenfeld, *supra* note 4, at 562.

⁸⁸ *Id.* at 556. While Professor Rosenfeld does not specify why the deadline would be measured by school days rather than calendar days under his proposal, school days measure the harm of delay in the educational context more precisely than calendar days because only delay over school days results in underutilized instructional time. The use of school days, however, raises questions about how to treat days in which a student receives educational services outside of the school's regular instructional calendar, such as accelerative or remedial summer school programs. The benefits from a calendar-day standard's ease of application may outweigh the benefits of a school-day standard's precision.

⁸⁹ *Id.* at 559-60.

Arbitrators would have discretion to consider issues *sua sponte* to ensure comprehensive resolution of the case.⁹⁰

The economic advantages of arbitration would be lost if parties could make costly appeals of arbitral decisions.⁹¹ To deter appeal of arbitral decisions, Professor Rosenfeld suggests that appellants be required to post a substantial⁹² bond that could only be recovered if the appeal succeeds.⁹³ Furthermore, formal records of the arbitral proceeding would be kept minimal to inhibit appeal.⁹⁴

Arbitral decisions must be enforceable for arbitration to be effective.⁹⁵ To be enforceable, a decision must clearly articulate the specific obligations of the parties.⁹⁶ In the special education context, an arbitral decision can achieve clarity by following the form of an IEP.⁹⁷ An arbitrated IEP would identify the student's short-term goals, necessary programs and services, the duration of those services, and who is responsible for arranging, providing, and monitoring the services.⁹⁸ Compliance with the arbitrated IEP would be enforced by the state education agency through complaint procedures.⁹⁹

D. Arbitration Would Require Explicit, Voluntary, And Fully Informed Consent.

Because arbitrators under Professor Rosenfeld's proposal would wield great power over all aspects of the arbitral proceeding, fairness demands that consent to arbitration be fully informed and clearly voluntary.¹⁰⁰ Professor Rosenfeld recommends that an independent third party, such as a state or local advocacy organization or law school clinical program, explain the arbitral process and respond to parents' questions

⁹⁰ Rosenfeld, *supra* note 4, at 560.

⁹¹ *Id.* at 555.

⁹² Professor Rosenfeld suggests that arbitrators set the bond amount on a case-by-case basis, individualized to the financial capabilities of particular parties. *Id.* at 556 n.35.

⁹³ *Id.* at 556.

⁹⁴ Although arbitrators would rely on informal records in reaching their decision, these records would be confidential as a matter of law. Rosenfeld, *supra* note 4, at 558.

⁹⁵ *Id.* at 548 n.12.

⁹⁶ *Id.*

⁹⁷ *Id.* at 557-58.

⁹⁸ *Id.*

⁹⁹ Rosenfeld, *supra* note 4, at 557-58.

¹⁰⁰ *Id.* at 560 n.47.

before the parents submit to arbitration.¹⁰¹ The independent third party would advise the parents: of their rights under IDEA generally; that attorneys would only be present at the parents' option; that arbitral procedures would be set at the complete discretion of the arbitrators; that the record of the proceeding would be confidential; and that the decision would be final and binding.¹⁰² Professor Rosenfeld posits that parents who have a full understanding of the arbitral process are likely to favor arbitration.¹⁰³

IV. CONSIDERATIONS FOR DESIGNING SPECIAL EDUCATION ARBITRATION

Professor Rosenfeld set forth his proposal “in the hope and expectation that others can and will identify oversights and make additional suggestions.”¹⁰⁴ The following section, responsive to Professor Rosenfeld’s expectation, offers four additional factors to consider in the design and practice of special education arbitration: legal standards, principal-agent problems, procedural fairness, and mutual acceptance.

A. Legal Standards In Special Education

Legal standards specific to special education are unlikely to prove useful to arbitrators. Because the bulk of special education decisions center on determining what services are “appropriate” under FAPE for a particular student, appropriateness is a central, inescapable issue in special education cases.¹⁰⁵ The main premise of Professor Rosenfeld’s proposal is that arbitration can reach for a “right answer as a matter of law and fact.”¹⁰⁶ Because the legal standard for FAPE is so easily met,¹⁰⁷ fulfilling “rightness as a matter of law” is an all-but-foregone conclusion in many special education disputes.

Because legal standards are unlikely to play a significant role in special education arbitration, decisions under Professor Rosenfeld’s proposed framework will likely turn on matters of fact. Congress has prescribed sensitivity to individual circumstances in special education cases through a series of amendments to IDEA. In 1997, Congress found that IDEA’s implementation had been impeded by “low expectations” and failure to use

¹⁰¹ Rosenfeld, *supra* note 4, 552-53.

¹⁰² *Id.* at 554.

¹⁰³ *Id.* at 552.

¹⁰⁴ *Id.* at 552.

¹⁰⁵ Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT’L ASS’N ADMIN. L. JUD. 214, 214 (2013) (observing that the “bulk of litigation under IDEA” concerns FAPE).

¹⁰⁶ Rosenfeld, *supra* note 4, at 563.

¹⁰⁷ *Supra* notes 23-24 and accompanying text.

“replicable research on proven methods.”¹⁰⁸ Congress further revised IDEA in 2004, requiring IEPs to be based on “peer-reviewed research to the extent practicable.”¹⁰⁹ Although the amendments have had little impact on how judges and hearing officers interpret IDEA,¹¹⁰ the new peer review provisions do provide legal grounds to base arbitral decisions on “factual rightness” as reflected in special education research. Because arbitral decisions under Professor Rosenfeld’s proposal are based on IEPs, arbitrators should draw from peer-reviewed research when making findings of fact. Likewise, since factual issues will likely turn on the panel’s interpretation of special education research, the educator-arbitrator’s professional judgment is likely to be the most important factor in arbitral decisions.

Enabling decision-makers to reach “the right answer as a matter of law and fact,” can also help create a more just body of case law for special education. Professor Rosenfeld suggests that special education arbitration be administered at the national level, and that it develop a national decisional law.¹¹¹ One potential method for realizing this vision would consist of an administering organization analogous to the American Arbitration Association which would maintain files of prior arbitral decisions.¹¹² The decisions would be indexed according to key terms representing common issues in drafting IEPs, and could serve as a body of case law for special education arbitration. The increased nation-wide uniformity resulting from this approach would be ideal for IDEA disputes because IDEA is a federal statute.¹¹³

Furthermore, a national association for special education arbitration would have an opportunity to succeed where courts have failed in developing just and meaningful legal standards. *Rowley* established a judicial reluctance to identify robust legal standards in special education.¹¹⁴ This reluctance is based on the judiciary’s doubts in its own educational expertise and its unwillingness to invade the states’ role in special

¹⁰⁸ Amendments to the Individuals with Disabilities in Education Act, Pub. L. 105-17, tit. I-A, sec. 601, §1400(c)(4), 111 Stat. 37, 39 (1997).

¹⁰⁹ Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-446, tit. I, sec. 614, § 1414(d)(1)(A)(i)(IV), 118 Stat. 2647, 2708 (2004).

¹¹⁰ See, e.g., *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 275-79 (3d Cir. 2012) (interpreting IDEA’s peer-review provisions to require services to be “reasonably calculated” to confer educational benefit, rather than “supported by the optimal level of peer-reviewed research”); See generally Zirkel, *supra* note 18, at 501-502.

¹¹¹ Rosenfeld, *supra* note 4, at 565.

¹¹² Documentation of prior decisions ought to be redacted to the extent appropriate for protecting students’ privacy.

¹¹³ Rosenfeld, *supra* note 4, at 565.

¹¹⁴ *Rowley*, 458 U.S. at 208 (“once a court determines that the requirements of [IDEA] have been met, questions of methodology are for resolution by the states”) ; See also *Joshua A. v. Rocklin Unified Sch. Dist.*, 319 Fed. Appx. 692, 695 (9th Cir. 2008) (citing *Rowley*’s reluctance in declining to adopt rigorous standard for IDEA’s peer-reviewed research provisions).

education.¹¹⁵ These concerns would be assuaged if IDEA disputes were arbitrated through an independent, national association *à la* Professor Rosenfeld's proposal because the decision-makers would have the expertise to resolve difficult special education questions, and because the association's case law would only be binding on parties who knowingly consent to arbitration.

B. Principal-Agent Problems

One primary critique of dispute resolution in special education is that current mechanisms place inadequate focus on the party who ought to be central to the dispute: the child.¹¹⁶ Both parents and schools can lose sight of the child's best interests in special education disputes.¹¹⁷ While parents place children's interests first in most cases, parents' and children's interests can come into tension.¹¹⁸ On the other hand, while schools are designed to serve the educational needs of their students, schools also face strong incentives that can conflict with students' interests.¹¹⁹ Special education arbitration should account for these principal-agent problems in design and practice.

1. Parent-child conflicts

Parents' and children's rights under IDEA are "intertwined, but also distinct."¹²⁰ While children with disabilities are entitled to free, appropriate, public education under IDEA, parents hold extensive procedural rights and a substantive right to shape their child's educational program.¹²¹ Parents' interests can diverge from the interests of children in special education disputes.¹²² For instance, parents may seek to place their child in an institutionalized educational setting to ease the burden of caring for the child

¹¹⁵ *Rowley*, 458 U.S. at 207-08.

¹¹⁶ *See Rosenfeld*, *supra* note 4, at 545, 548-51.

¹¹⁷ *See infra* notes 118-119.

¹¹⁸ The tension between the parents' and child's interest has been explored in the context of attorney representation in special education cases. *See* Yael Zakai Cannon, *Who's the Boss?: The Need for Thoughtful Identification of the Client(s) in Special Education Cases*, 20 AM. U. J. GENDER SOC. POL'Y & L. 1 (2011); *see also* Jillian Petrer, *The Ethical Dilemma of a Special Education Lawyer: Who is the Client?*, 31 PACE L. REV. 531 (2011).

¹¹⁹ Elizabeth Burleson, *Perspective on Economic Critiques of Disability Law: The Multifaceted Federal Role in Balancing Equity and Efficiency*, 8 IND. HEALTH L. REV. 335, 345-53 (2011).

¹²⁰ Cannon, *supra* note 118, 49; *See also Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531-32 (2007).

¹²¹ *Winkelman*, 550 U.S. at 528-31.

¹²² *See supra* note 118.

at home when the child would gain greater benefit from a more inclusive setting.¹²³ Arbitrators should be alert for such conflicts, and focus on reaching a decision in the best interest of the child without infringing parental rights.

To help the arbitral panel reach a child-centered decision, one of the arbitrators should take responsibility for focusing on the child's interests, as distinct from the parties' interests. Because the disability expert on the arbitration panel is best-positioned to understand the interests, challenges, and capabilities of the child, the disability expert should be charged with this responsibility. Because parents have the right and responsibility to enforce their children's rights under IDEA,¹²⁴ the parents should select the particular arbitrator who will fill that role. Therefore, parents should select the individual arbitrator who will serve as the disability expert, and that arbitrator should be explicitly instructed to focus on the interests of the child rather than the parties.

2. School-student conflicts

Schools regularly make difficult decisions about how to use their scarce resources to further their educational missions.¹²⁵ While schools may be better positioned to understand the costs and benefits of individual special education services than arbitrators, perverse incentives may cause schools to miscalculate when weighing costs and benefits.¹²⁶ For instance, when a school receives a flat grant for each student with a disability, schools have incentive to under-identify students with more costly disabilities, and over-identify students with less costly disabilities.¹²⁷ Additionally, incentives to demonstrate short-term effectiveness of special education services may cause schools to undervalue long-term benefits of such services.¹²⁸ Arbitrators should be alert for factors which may cause schools to miscalculate the value of a special education service, and

¹²³ ROTHSTEIN & JOHNSON, *supra* note 13, at 59; Cannon *supra* note 118, at 47.

¹²⁴ Cannon, *supra* note 118, at 19-23; 20 U.S.C. 1400(c)(5)(B) (2014).

¹²⁵ Burleson, *supra* note 119, at 348-49 (school must consider the costs and benefits of allocating resources for a student's special education services and the opportunity cost of allocating the resources elsewhere); Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 439 (2012) ("[Schools], operating under significant budgetary constraints, face pressure to design IEPs with an eye to the financial burden of providing special education services.").

¹²⁶ Burleson, *supra* note 119, at 349.

¹²⁷ See, e.g., Dan Hardy, *Inside Chester Community Charter: Drawing praise, money, criticism*. PHILA. INQUIRER, March 18, 2012, at A01, available at http://articles.philly.com/2012-03-18/news/31207769_1_school-choice-largest-charter-chester-upland-school-district. (reporting that, in a charter school which received a flat grant of "\$25,528 for every special-education student," students with disabilities were overrepresented and that a disproportionate number of those students were identified with a mild disability).

¹²⁸ Burleson, *supra* note 119, at 349.

accord appropriate weight to schools' determinations. These considerations are becoming more crucial with the rise of the charter school movement, where market accountability principles increasingly come into conflict with the civil-rights based principles of special education.¹²⁹

C. Procedural Fairness

Arbitration can only serve as a valid alternative in special education disputes if it is fair. Maintaining fairness can be especially tricky in processes which value efficiency, such as arbitration, since its administrators must make tradeoffs between efficiency and fairness. Nevertheless, arbitration can achieve fairness through dedication to fair procedures. Two aspects of procedural fairness, subjective fairness and arbitrator selection, are particularly relevant to special education arbitration.

Subjective fairness, the parties' perceptions of the fairness of a process,¹³⁰ is a particularly appropriate measure in special education disputes. Because a primary criticism of the DPH is its lack of subjective fairness,¹³¹ arbitration's success as a meaningful alternative to the DPH process depends largely on whether it achieves subjective fairness. Additionally, parties who perceive a process as procedurally fair are more likely to view its outcome as substantively fair, and comply with its outcomes even when doing so is inconsistent with their preferences.¹³²

Professor Nancy Welsh¹³³ has identified four characteristics which are highly predictive of subjective fairness: first, the parties have an opportunity "tell their story;" second, the decision-maker demonstrates consideration of the parties' stories; third, the decision-maker signals even-handedness and open-mindedness; and fourth, the parties are treated in a dignified, respectful manner.¹³⁴ Accordingly, parties should be given a thorough opportunity to "tell their story" using a familiar format. Furthermore, arbitrators should demonstrate that they have heard the parties, such as explicitly addressing disputants' arguments during an oral hearing. Additionally, arbitrators should signal their even-handedness by, for example, holding proceedings at a neutral site.¹³⁵

¹²⁹ See Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655 (2012); see generally GARY ORFIELD, ERICA FRANKENBERG, & ASSOCS., EDUCATIONAL DELUSIONS?: WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR (2013).

¹³⁰ Cope-Kasten, *supra* note 4, at 509.

¹³¹ Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILDREN 546 (1991); Cope-Kasten, *supra* note 4, at 511-18.

¹³² Welsh, *supra* note 56, at 424.

¹³³ William Trickett Faculty Scholar at Penn State's Dickinson School of Law.

¹³⁴ Welsh, *supra* note 56, at 424.

¹³⁵ See Welsh, *supra* note 55, at 559-660 (positing that special education mediation should take place at a site other than school property to signal that parents and school officials are equal participants).

Finally, arbitral proceedings should maintain a level of social formality that conveys dignity and respect for all the parties.

In addition to subjective fairness, procedural fairness can also be enhanced through an equitable method of selecting arbitrators. Professor Rosenfeld's proposal would follow the common arbitral practice of each party choosing an arbitrator, and the two party-selected arbitrators jointly choosing the third "neutral" arbitrator.¹³⁶ Because the educator-arbitrator's professional judgment is likely to be the most crucial factor in arbitral decisions,¹³⁷ the educator-arbitrator should be the neutral arbitrator to preserve the neutrality of the panel as a whole. As discussed *supra*, parents should choose the disability expert because IDEA recognizes parents as the primary advocates of their child's interests, and the disability expert is best-positioned to understand those interest.¹³⁸ The remaining arbitrator, the attorney, should be selected by schools.

D. Mutual Acceptance

While special education arbitration ought to focus on the interests of the child, parents, and schools are unlikely to agree to arbitration if the process disregards their interests. Because arbitration would only commence with the consent of the parties, its viability as a dispute resolution option depends on its ability to craft solutions that are mutually acceptable to the parties. Arbitrators are more likely to reach a mutually acceptable resolution by incorporating a problem-solving approach in their decision-making.¹³⁹ Under this approach, arbitrators would focus on understanding the parties' underlying interests,¹⁴⁰ and may "probe and even push for explanations and underlying interests from both school officials and parents."¹⁴¹ Once these interests are surfaced, arbitrators may engage with the parties in generating options to serve those interests.¹⁴² Arbitrators can generate options by soliciting proposals from the parties or engaging in brainstorming sessions *à la* mediation.¹⁴³ Unlike mediation, however, the ultimate decision would lie with the arbitrators.

¹³⁶ Rosenfeld, *supra* note 4, at 562.

¹³⁷ See *supra* Part IV.A.

¹³⁸ See *supra* Part IV.B.1.

¹³⁹ The problem-solving approach aims to "satisfy [the parties'] interests and produce joint gains." RISKIN ET AL., *supra* note 69, at 193.

¹⁴⁰ LEONARD L. RISKIN, *Mediation Training Guide*, in RISKIN ET AL., *supra* note 68, at 336 (providing instructions for bringing out underlying interests in the mediation context); See also RISKIN ET AL., *supra* note 68, at 202-10 (illustrating "focus on interests" in the negotiation context).

¹⁴¹ Welsh, *supra* note 55, at 659 (recommending problem-solving methods for special education mediators).

¹⁴² RISKIN ET AL., *supra* note 69, at 210-14 (illustrating consideration of a variety of options in the negotiation context).

¹⁴³ RISKIN, *supra* note 140, at 338-39.

V. CONCLUSION

As Congress prepares to reauthorize IDEA, stakeholders are pressing Congress to revise IDEA's dispute resolution regime. While both due process hearings and mediation occupy prominent and perhaps essential roles in IDEA's dispute resolution system, the shortcomings of each process leave some disputants with no satisfactory method of resolving special education disputes. Professor Rosenfeld's proposed arbitration alternative may offer the right framework to fill this gap. To extend consideration of Professor Rosenfeld's proposal, this article has explored how an arbitration alternative for special education disputes could help shape legal standards, handle principal-agent problems, achieve procedural fairness, and reach for mutual acceptance. With these considerations in mind, dispute resolution designers and practitioners should strive to steer processes toward outcomes that are right "as a matter of law and fact."¹⁴⁴

¹⁴⁴ Rosenfeld, *supra* note 4, at 563.