UNE PROCÉDURE EN DIFFICULTÉ: A BLUEPRINT FOR RESOLVING “SPECIAL” EDUCATION DISPUTES THROUGH A QUASI-INQUISITORIAL ADMINISTRATIVE PROCESS

Stephen A. Rosenbaum

In this essay, disability practitioner and scholar Stephen Rosenbaum proposes a radical change in the United States administrative adversarial adjudicatory process for resolution of “special” education disputes between educators and students with disabilities, looking for inspiration in part to Canada and the Commonwealth’s use of an inquisitorial approach. Typically, the dispute is over whether the students—termed “les enfants en difficulté” in French-speaking Canada—are receiving an appropriate array of instructional interventions and services. Adversarial adjudication has had many critics over the years. Asking a judge to weigh the parent (or student’s) preferred options under the U.S. Individuals with Disabilities Education Act [IDEA] against those of the school administration may not be the optimal method for designating a pupil’s educational program—nor a good use of time and money.

The author’s blueprint calls for replacing the IDEA due process hearing with another model in instances where the family and school authorities disagree about the components of a student’s instructional program. Under current law, the hearing is typically conducted by an administrative jurist in which the parties present evidence, expert testimony and argument, if they have been unable to resolve their disagreement at a school-based team meeting, mediation or some other informal conference. In the proposal presented here, disagreements would instead be reviewed by a “special master” whose expertise is in education or disability rather than law. Through a process of problem-solving or “active adjudication,” the master (or “independent educational reviewer”) would attempt to quickly resolve the dispute over appropriate placement, instructional strategies and/or services. The master could hold a conference, conduct a hearing or brief investigation, receive more documents, consult with experts or correspond in some other mode with the parties. The master’s determination would be subject to judicial review in limited circumstances.

* John & Elizabeth Boalt Lecturer, School of Law and Visiting Researcher Scholar, Haas Institute for a Fair and Inclusive Society, University of California, Berkeley. I thank James Rosenfeld for initiating the conversation on streamlining dispute resolution and proposing an alternative, and Kip Hustace and Doron Dorfman for comments on an earlier draft. I apologize to Mark Weber, who has defended so ardently the due process hearing model. This article is based on a paper I presented at the symposium Exploring Law, Disability and the Challenge of Equality in Canada and the United States (Berkeley Law, 5 Dec. 2014) and is dedicated to David Rosenbaum Alfantary (1986-2012).
Dans le présent essai, Stephen Rosenbaum, avocat et universitaire spécialisé en matière d’éducation et de la situation de handicap, s’inspire en partie de l’approche inquisitoire suivie au Canada et au Commonwealth pour proposer une modification radicale du processus contradictoire qu’utilisent les instances administratives américaines pour résoudre les différends opposant les éducateurs et les élèves avec les incapacités intellectuelles ou psycho-sociales. Habituellement, le différend porte sur la question de savoir si les élèves, appelés « les enfants en difficulté » dans le Canada francophone, reçoivent un éventail approprié de services d’aide et d’intervention en matière d’éducation. Le processus contradictoire a été décrié à maintes reprises au fil des années. Demander au juge de souperer les options que privilégient les parents (ou les élèves) en application de la loi des États-Unis intitulée Individuals with Disabilities Education Act [IDEA] par rapport à celles de l’administration scolaire n’est peut-être pas la meilleure façon de procéder pour élaborer le programme d’éducation d’un élève, et ne représente pas non plus une bonne utilisation des ressources.

L’auteur propose de remplacer l’audience équitable prévue par l’IDEA par un autre processus dans les cas où la famille et les autorités scolaires ne s’entendent pas sur le contenu du programme d’éducation d’un élève. Selon la loi actuellement en vigueur, l’audience est habituellement conduite par un juriste administratif devant lequel les parties présentent des éléments de preuve, des témoignages d’expert et des arguments, si elles ont été incapables de régler leur différend lors d’une rencontre, d’une séance de médiation ou d’une autre conférence informelle avec une équipe pluridisciplinaire de l’école. Dans le modèle proposé ici, les désaccords seraient plutôt examinés par un « special master » (conseiller spécial) qui serait spécialisé en matière d’éducation ou de la situation de handicap plutôt qu’en droit. Dans le cadre d’un processus axé sur la résolution de problèmes ou sur l’« arbitrage actif », le conseiller (ou l’« examinateur pédagogique indépendant ») s’efforcerait de régler rapidement le différend au sujet du placement ou des services ou stratégies pédagogiques qui conviennent. Le conseiller pourrait tenir une conférence, conduire une audience ou une brève enquête, recevoir d’autres documents, consulter des experts ou correspondre d’une autre manière avec les parties. La décision du conseiller serait susceptible de contrôle judiciaire dans des circonstances restreintes.

I. INTRODUCTION

As a means of resolving “special” education disputes, adversarial adjudication has had many critics over the years. Typically, the dispute is over whether the student with a disability is receiving an appropriate array of instructional interventions and services. Asking a judge to weigh the parent (and student’s) preferred options under the U.S. Individuals with Disabilities...
Education Act [IDEA]¹ against those of the school administration may not be the optimal method for designating a pupil’s educational program—or a good use of time and money.

I write “special” education in quotation marks for several reasons. First, the word “special” is vague and superfluous. Before it was defined in regulations,² the Office of Special Education Programs offered a tautological definition that “specially designed instruction” means “education planned for a particular individual or ‘individualized instruction.’”³ This is like saying the definition of special education is “special education” or “specialized education.” Second, the terms “special” and “special needs” raise the hackles of disability activists (but not necessarily students’ parents).⁴ Third, in an effort to reject segregation and separation in favor of inclusiveness and universality, I think that “special” education should be supplanted simply by “education.”

In this essay, I lay out a blueprint for radical change, looking for inspiration in part to Canada and the Commonwealth’s use of inquisitorial processes in administrative proceedings, and to the role of educators as tribunal members⁵ in “special” education hearings concerning les enfants en difficulté.⁶ In brief, my proposal is to replace the IDEA adversarial hearing with another model in instances where the family and school authorities disagree about the components of a student’s instructional program. Under current law, the hearing is typically conducted by an administrative

---

¹ Assistance for Education of All Children with Disabilities, 20 USC § 1412 (2012). Originally enacted as the Education for All Handicapped Children Act of 1975, and then renamed, the statute was amended most recently a decade ago and rebranded as the Individuals with Disabilities Education Improvement Act, Pub L No 108-446, 118 Stat 2647. (Congress, in its wisdom, allows it to still be referred to as the Individuals with Disabilities Education Act, 20 USC § 1400(a) (2012)). For an outline of IDEA procedural safeguards, see ibid at §§1414(b), 1415, 34 CFR §§300-503-300.512. For an overview of changes or “improvements” in the 1994 Act see, Mark C Weber, “Reflections on the New Individuals with Disabilities Education Improvement Act” (2006) 58 Fla L Rev 7 at 16-22.


⁴ See e.g. posting from lawyer and blogger Steve Gold (28 October 2008) online <stevegoldada.blogspot.com>. Gold lamented several years ago that “it will take a long time for people with disabilities to rid ourselves of our new handle [of] ‘special needs’ people. It amazes me that there has not been a loud outcry by the disability rights community on this paternalistic description of us ....” Ibid.

⁵ For example, three of the seven Members of the Ontario Special Education Tribunal have an educator’s background, Government of Ontario, Agency Member Biographies, online: Public Appointment Secretariat <https://www.pas.gov.on.ca/scripts/en/bios.asp?minID=36&board-ID=751&pensID=122955#1> Members are selected for their “experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal; aptitude for impartial adjudication; aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal’s rules.” Their appointment by the Attorney General is consistent with the Education Act, RSO 1990, c E-2, Part II.1, s 57; and the Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, SO 2009, c 33, Schedule V, s 15; O Reg 126/10.

⁶ In Ontario, the French term for the Special Education Tribunals is Tribunaux de l’enfance en difficulté. Social Justice Tribunals Ontario online: Social Justice Tribunals Ontario <http://www.sjto.gov.on.ca/fr/>. The term is both universalizing and less stigmatizing than the usual labels. In Quebec, handicappé, and ayant un handicap or en situation de handicap, are being replaced with personne avec une incapacité. See e.g. Gouvernement du Québec, Vivre avec une incapacité au Québec (Quebec: Institut de la Statistique du Québec, 2010), online: Institut de la statistique du Québec <http://www.stat.gouv.qc.ca/statistiques/sante/etat-sante/incapacite/incapacite-quebec.pdf>.
jurist in which the parties present evidence, expert testimony and argument, if they have been unable to resolve their disagreement at a school-based team meeting, mediation or some other informal conference. In the schema presented below, disagreements would instead be reviewed by a “special master” whose expertise is in education or disability rather than law. Through a process of problem-solving or “active adjudication,” the master would attempt to quickly resolve the dispute over appropriate placement, instructional strategies and/or services. She could hold a conference, conduct a hearing or brief investigation, receive more documents, consult with experts or correspond in some other mode with the parties. The master’s determination would be subject to narrow judicial review.

Could a quasi-inquisitorial approach be preferable to an “agency trial” in resolving disputes over what constitutes an appropriate education? It may be heresy for a students’ attorney to argue that the voice of the youth with disabilities and their families should not be on equal footing with that of the educational professional, nor that law should be privileged over pedagogy. However, there would still be a place in this model for informal dispute resolution at the IEP table or at mediation, as well as ardent advocacy (both micro and macro) by parents and students—and an appeal to a court of law in limited circumstances.

---

7 For nearly 20 years I have advised and represented students and families at IEP meetings, mediations and due process hearings, under the auspices of various NGOs and as a private licensed practitioner. I have also conducted scores of parent training and informational sessions. My oldest son, David, born with very significant intellectual and physical disabilities, was enrolled in “full inclusion” programs for more than 17 years in California public schools, bolstered by intermittent and varying degrees of parental advocacy.

8 “People First” language, e.g., “person with a disability,” is used to accentuate the humanity rather than the impairment or disabling condition. However, for the sake of brevity and variation, I also use “disabled” as an adjective. Some activists and academics actually use “disability first” language out of habit, for emphasis, or to reclaim antiquated or pejorative terms (crippled or cripp) as a statement of pride or insider speak. Stephen A Rosenbaum, “Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All” (2004) 15:14 Hastings Women’s LJ 1 at 4 [Rosenbaum, “Aligning or Maligning?”]. In fact, this language is preferred by some organizations in Commonwealth countries. See e.g. the United Kingdom Disabled People’s Council home page, “We are the national umbrella organisation of disabled people, run and controlled by, and representing the voices of disabled people in the UK” (22 January 2015), online: United Kingdom Disabled Peoples Council <http://www.ukdpc.net/site/>; and the Disabled Persons Assembly, “Our core function is to help engage the New Zealand disability community to listen to the views of disabled people …” (22 January 2015), online: Disabled Peoples Assembly NZ <http://www.dpa.org.nz/about-us/about-dpa>. On the art and politics of labeling, see Stephen A Rosenbaum, “The Alien Cloak of Confidentiality: Look Who’s Wearing It Now” (1992) 4:8 John F Kennedy L Rev 23 at 24 (choosing commonly used terms or those that reflect society’s prejudice). But see, Richard Fung, “Looking for My Penis: The Eroticized Asian in Gay Porn” in Bad-Object Choices, eds, How Do I Look? Queer Film and Video (Seattle: Bay Press, 1991) 145 at 168 (“too much time spent on the politics of ‘naming’ can in the end be diversionary”).

9 The hallmark of special education, the IEP [Individualized Education Program] is a written statement of a child’s educational levels of academic achievement and functional performance and measurable goals, as well as the instructional methodologies and services developed by a team of educators and parents. See 20 USC § 1401(19) (2012); 34 CFR §§ 300.22, 300.320–300.324 (2014). The resulting IEP becomes the guide for teachers, paraprofessionals and specialists for the academic year. I have previously commented that “the ritual of writing lengthy IEPs seems to follow less from the law than from district or parent culture” and that “[p]arents and school staff are too busy to assemble around a table on under-sized chairs for [these] marathon session[s]…” Stephen A Rosenbaum, “When It’s Not Apparent: Some Modest Advice to Parent Advocates for
The savings in time, cost and angst could be channeled instead into more applied research, hiring local district experts, parental involvement inside and outside the classroom, and genuine collaboration between families and professional educators. For example, a move away from an adversarial administrative hearing practice and culture could mean more funds and time for collaborative educational planning workshops, alternative dispute resolution, or release time for curricular adaptation and parent-teacher conferences.

While the IDEA holds a place in the canon of U.S. disability civil rights and human rights law, along with the Rehabilitation Act of 1973, Section 504, Americans with Disabilities Act [ADA] and the United Nations Convention on the Rights of Persons with Disabilities, it is perhaps best characterized as a remedial education statute. The Act is intended to provide interventions, supports, services, auxiliary aids and specialized instruction to disabled students or what might facetiously be referred to as “unreasonable accommodations.” The genesis for the IDEA was the widespread exclusion of children with disabilities from attending school, whereas today’s typical dispute centres on how fully those pupils are being educated once inside

---

10 29 USC § 794 et seq (2012).
12 13 December 2006, A/RES/61/106. An even more ambitious defense of disabled students’ rights to full development of human potential, inclusive and life-long education would be grounded in implementation of this Convention [UNCRPD], which has been ratified by Canada—but not the United States. See, UNCRPD, at art 24, ss (1)(a), (2)(a), 5. However, that is beyond the scope of this article.
13 This view is not universally shared. See e.g. Mark C Weber, “The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes” (1990) 24 UC Davis L Rev 349 at 359,362, 411 (IDEA predecessor statute is founded on equal educational opportunity, equal protection of the law and human rights). However, as discussed below, for those students who contest their placement in segregated settings as a violation of IDEA’s least restrictive environment (LRE) clause, the IDEA does contemplate relief. In addition, students have been too easily removed from schools for behaviour that is disability-based. See e.g. Honig v Doe, 484 US 305 (1988). I submit that those circumstances do indeed present civil rights challenges and it is not my intent here to tinker with the jurisprudential and codified procedural safeguards that have been mandated for students facing suspension or expulsion.
14 The better expression might be accommodations or resources that “exceed reasonable cost.” See Michael Ashley Stein & Penelope J S Stein, “Beyond Disability Civil Rights” (2007) 58 Hastings LJ 1203 at 1224. The authors argue that paying these additional costs could perhaps even “enable above-average function.” (emphasis added).
15 In Pennsylvania Ass’n for Retarded Children [PARC] v Pennsylvania, 334 F Supp 1257 (ED Pa 1971), 343 F Supp 279 (ED Pa 1972), plaintiffs challenged a state law that allowed schools to exclude children who had not reached a “mental age of five years.” In Mills v Board of Education, 348 F Supp 866 (DDC 1972), seven school-age children sued the local school district after they were denied placement in a public educational program for substantial periods of time because of alleged mental, behavioural, physical or emotional disabilities, and the district’s limited financial resources. In instances where children were not permitted to enroll in local schools, they were often “warehoused” in those same schools. In 1974, the House Committee on Education and Labor reported that two-thirds of the 5.5 million disabled children were either “excluded from schools or, sitting idly in regular classrooms awaiting the day they would be old enough to drop out.” House Rep 93–805, US Code Cong & Admin News (1974) at 4093 at 4137–38.
the schoolhouse door. The special education concept should be viewed therefore through a remediation rather than a rights-based lens. On the other hand, Section 504 and the ADA more aptly protect against disability-based discrimination. These statutes and jurisprudence are necessary complements to the IDEA insofar as they enunciate principles of equal protection, integration and destigmatization.\(^\text{16}\)

Whether criticism of due process\(^\text{17}\) hearings is based on hard data or perceptions,\(^\text{18}\) the fact remains that a rights-based, adversarial appeal—even when a decision is issued within a specified time frame—can still be contentious, time-consuming and/or expensive. Moreover, the administrative hearing process is typically not conducive to developing or maintaining a respectful and productive relationship between family and school.

I am recommending a new procedure for resolving disputes over the proper educational program or services, and one that is determined by best educational practices, rather than due process of law or the assertion of rights. In addition, the review should not be grounded in an adversarial or “active adjudication” procedure.\(^\text{19}\)

This reform proposal is based on two key principles: First, a belief in professional judgment as the overriding factor in any kind of educational planning and execution. In determining a student’s individualized education program, where there is no school-family consensus, the dominant voice should be that of a knowledgeable and experienced educator. The perceptions, objections and learning objectives offered by the parent or other caregiver—and by the student herself, if able—are, of course, important inputs in the IEP process as well, particularly when they are stripped of rhetoric or jargon and are based on personal observation, insight, cultural perspective, knowledge and/or aspiration.

Fellow parent Carrie Griffin Basas writes elsewhere in this volume: “Parents provide unique insights into the experiences of their children and may


\(^{17}\) “Process” is notably pronounced differently depending on whether the speaker is north ([proh-cess] [proʊses]) or south ([prah-cess] [prɑːsɪs]) of the US-Canadian border. In a nod to the transnational theme that inspired this article, I examine the inquisitorial model—which has been utilized successfully in Canadian and other Commonwealth administrative decision-making contexts—for what it may offer to the special education dispute resolution process.

\(^{18}\) Some commentators maintain that relations between parents of disabled students and their respective schools are generally good and only a small fraction of families actually file special education cases in court. See Reece Erlichman, Michael Gregory & Alisia St Florian, “The Settlement Conference as a Dispute Resolution Option in Special Education” (2014) 29:3 Ohio St J Disp Resol 407 at 408-09 & n 11. Still, the perception or misperception persists that “special education is a “particularly litigious enterprise…” Ibid at 408. The term “litigious” is itself ambiguous, as it may include matters ranging from the filing of complaints with state education agencies and the federal Office of Civil Rights, to due process petitions to lawsuits in state and federal court.

have different cultural perceptions of the importance—or lack thereof—of language or disability assimilation, for example, that extend beyond seeing their children as having deficits.”

Second, if there is no agreement at the IEP table, the review, oversight or appeal should be cloaked less in due process than in quality assurance, as administered by a corps of education specialists, rather than jurists.

II. PROBLEMS WITH THE CURRENT DUE PROCESS ADJUDICATORY MODEL

Except for instances where administrative remedies have been exhausted or proven futile, litigation in the special education arena typically begins with a due process hearing before an agency independent hearing officer or administrative law judge. Most states have adopted a one-tiered hearing system, with appeals filed directly with a federal district or state trial court, if unsuccessful at the hearing. These adjudicative hearings and appeals garner the most attention from policy makers and politicians in terms of the alleged “cost” of due process.

---

20 Carrie Griffin Basas, “Advocacy Fatigue: Self-Care, Protest, and Educational Equity” (2015) 32:2 Windsor YB Access Just 37. Disability Justice writer and organizer Mia Mingus writes: “People usually think of disability as an individual flaw or problem…It is rare that people think about disability as a political experience or as encompassing a community full of rich histories, cultures and legacies….” Mia Mingus, “Changing the Framework: Disability Justice; How our Communities can Move Beyond Access to Wholeness” (12 February 2011) Leaving Evidence online: <https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/>. The Disability Justice movement, which is grounded in intersectionality, is at the forefront of the “mov[e] away from an equality-based model of sameness and ‘we are just like you’ to a model of disability that embraces difference, confronts privilege and challenges what is considered ‘normal’ on every front.”


22 See Perry A Zirkel & Gina Scala, “Due Process Hearing Systems Under the IDEA: A State-by-State Survey” (2010) 21 J Disability Pol’y Stud 3 at 6-7 (finding that most recent survey claimed 41 states have one-tier systems and ten have two tier systems); 20 USC §§ 1415(g)(1)-(2) (2012) (in two-tier system, parties must first file with an appeals officer or board before bringing an action in court).
A parent may initiate an impartial hearing to resolve complaints concerning “any matter relating to the identification, evaluation, or educational placement” of the child. For the most part, the parties in IDEA disputes disagree about what constitutes FAPE [Free Appropriate Public Education] or LRE [Least Restrictive Environment], the appropriateness of a placement or related services, and/or the quality and quantity of the latter.

A decision rendered in an impartial hearing is final, absent a timely appeal. Independent hearing officers have the power to order a school system to “take any number of actions in order to correct violations of IDEA…including modifying an IEP, implementing an existing IEP it has failed to carry out, providing a particular placement, [or] providing a particular related service.” Other available remedies include retroactive reimbursement for private placement or services, advance payment for placement or services, and compensatory education.

The current process has been described as unduly expensive for parents and school districts alike, and inaccessible to many parents due to the cost or unavailability of attorney representation. It is particularly difficult for “unrich families” to bear the burden of proof of

---

23 20 USC §§ 1415(b)(6), (f).
24 FAPE is defined as special education and related services that: (A) have been provided at public expense; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program. Ibid at § 1401(9).
25 In the educational context, LRE means that “[t]o the maximum extent appropriate,” children with disabilities are educated with non-disabled children. They are educated in special classes, separate schooling, or other settings removed from the regular educational environment “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” Ibid at § 1412(a)(5).
26 Ibid at § 1415(i).
28 20 USC § 1412 (a)(10)(C)(ii) (2012) (reimbursement for private school placement available when district failures to provide FAPE). See also Burlington School Committee et al v Massachusetts Department of Education, 471 US 359 at 368 (1985) (explaining how failure to provide FAPE gives rise to a claim for compensatory education or services, a judicially constructed remedy under theory of tuition reimbursement).
29 On the impact of major Supreme Court decisions on financing due process hearings under IDEA, see e.g. Mark C Weber, “Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home v West Virginia Department of Health and Human Resources” (2004) 65 Ohio St LJ 357 (invalidating catalyst theory for recovery of attorneys’ fees for federal disability civil rights actions under Buckhannon, 532 US 598 (2001)) and Ashlie D’Errico Surur, “Placing the Ball in Congress’ Court: A Critical Analysis of the Supreme Court’s Decision in Arlington Central School District Board of Education v Murphy 126 S Ct 2455 (2006)” (2007) 27:2 J Nat’l Ass’n Admin L Judiciary 547 at 598–602 (commentary on ruling that prevailing parties are not entitled to expert fees under IDEA). The heavy burden of proof allocated to the moving party under Supreme Court jurisprudence may itself be another deterrent. See e.g. Ruth Colker, “California Hearing Officer Decisions” (2012) 32: J Nat’l Ass’n Admin L Judiciary 462 at 463, 467-72 (discussing burdens of persuasion and production established under Schaffer v Weast, 546 US 49 (2005)).
30 See, David C Vladeck, “In Re Arons: The Plight of the ‘Unrich’ in Obtaining Legal Services,” in Deborah L Rhode & David Luban, eds, Legal Ethics Stories 260 (New York: Foundation Press, 2006) (explaining that neither “low income” nor “poor” capture the socio-economic status of some families as well as “privileged” or “unrich”). I have written in support of a more accessible, affordable and robust dispute resolution process—including the availability of due process hearings—under the existing IDEA statute, jurisprudence, policies and
the IDEA’s requirements, obtain attorneys, to commission independent evaluations and expert witnesses, or generate a track record of success in a private placement.

Other criticisms include delay in the adjudication process and the onset of friction and tension that taint the relationship between parents and school authorities. Yet another report, this time issued by the American Association of School Administrators [AASA], has declared that the hearing process is “out of control.”

### III. OVER-LEGALIZED PROCESS

Complaints about the so-called technical and cumbersome requirements of the IDEA usually

---

31 While the appearance of an attorney can accomplish much in the short-term, it can also have negative consequences. For example, if the parent’s attorney attends an IEP meeting, it almost always prompts the school district to send its own lawyer too, driving up costs and heightening tensions. Kevin J Lanigan et al, “Nasty, Brutish…and Often Not Very Short: The Attorney Perspective on Due Process”, in Chester E Finn, Andrew Rotherham & Charles R Hokanson, eds, Rethinking Special Education for a New Century (Washington, D.C.: Thomas B Fordham Foundation and the Progressive Policy Institute, 2001) 216.


33 With some exceptions, the district must attempt to resolve the due process complaint within 30 days. If not resolved, a final hearing decision must be issued 45 days later, unless the parties waive the relevant timelines. 34 CFR 300.510(b)-(c), 300.515 (2014), At best, a dispute is resolved by a hearing almost 2-1/2 months after filing. Sometimes even the statutory deadlines are not adhered to. S James Rosenfeld, “It’s Time for an Alternative Dispute Resolution Procedure”, (2012) 32 J Nat’l Ass’n Admin L Judiciary 361 at 373-34 (arguing for speedy resolution of disputes, while acknowledging logistical or strategic reasons for delay). As the typical school year lasts 9-1/2 months, the requested relief may have only a negligible or symbolic effect on a student’s current program by the time a decision is rendered and implemented.

34 Education professor and former appeal panelist Perry Zirkel commented many years ago that due process was too time-consuming, overly adversarial and unduly formal. Perry A Zirkel, “Over-Due Process Revisions for the Individuals with Disabilities Education Act” (1994) 55 Mont L Rev 403 at 405 [Zirkel, “Over-Due Process”].

35 Sasha Pudelski, Rethinking Special Education Due Process (AASA), April 2013. Special education expert and prolific commentator Mark Weber has catalogued and responded in detail to criticisms of due process made by administrators, politicians and scholars. See, generally, Weber, “Due Process, supra note 32.
include an attack on students’ extensive due process rights or over-reliance on the procedural nature of the school compliance process. Among these are the right to call IEP meetings on thirty days’ notice; to require the attendance of certain persons at meetings and consideration of certain curricular matters; to request an independent evaluation of a student for a suspected disability; to receive notice of, and challenge to, a placement or level of services; and to compel program and legal compliance. Criticism typically centres on the cost or utility of these procedures, particularly at the level of administrative hearings or litigation, but it may also emanate from “a strong resentment by educators of the parental right and power…to challenge the educators’ professional judgment.” Parents, too, have been found to be dissatisfied with some of the formalized adversarial proceedings. An early study of due process implementation found that “parents generally reported both considerable expense and psychological cost in the hearing process. They often felt themselves blamed either for being bad parents or for being troublemakers.”

It is easy to dismiss the criticism of hyper-legalized procedural safeguards as rhetoric from harried school administrators, or the rehashed dogma of anti-regulatory conservatives.

---

36 For example, one ex-principal said to be sympathetic to IDEA complained of “the cumbersome implementation of a law that has magnified the concept of due process to the point that it overshadows other school-based concerns, such as instruction and learning.” Zirkel, Over-Due Process, supra note 34 at 404 (citing Pete Idstein, “Swimming against the Mainstream: Seeking More Services for Special Elementary School Students” (1993) 75:4 Phi Delta Kappan 336 at 337).

37 20 USC §§ 1412-1416 (2012).

38 See generally Zirkel, “Over-Due Process”, supra note 34 at 405-07 (citing legal specialists, parents and judicial officers). Popular belief notwithstanding, a study by the US General Accounting Office (GAO) has shown that the actual number of due process hearings and state compliance complaints is small. Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts (GAO-03-897) (September 2003). Ibid at 12-13. In a more recent study, Professor Perry Zirkel reports that the number of hearing requests filed has remained fairly constant from 2006 to 2012, although the number of written decisions by hearing officers has declined by almost half. As in the GAO study, filings are still concentrated in a handful of states and federal jurisdictions. Perry A Zirkel, “Longitudinal Trends in Impartial Hearings Under the IDEA” (2014) 302 W Ed Law Rep 1 at 1-4. For a history and background description of the IDEA due process provisions, see Lanigan et al, supra note 31 at 213-20.


41 A progressive critique might actually attack the safeguards as obsessive “focusing more on compliance with the system’s regulations than on school accountability for student outcomes.” Eric Zachary & Shola olatoye, A
Nonetheless, it must be acknowledged that the procedures have at times been adhered to in a pro forma or even burdensome manner — with no corresponding positive effect on a child’s educational objectives, school program or learning outcomes.\(^{42}\) Moreover, there has been much rancour in the school conference rooms and administrative offices, not to mention the federal courthouse. Crafting an IEP may not in fact be a very collaborative process when parents receive little advance notice, lack substantive knowledge and objectivity and/or face school officials “often speaking to each other in technical terms.”\(^{43}\) Despite the Congressional intent that school officials and parents be jointly and continuously involved in IEP development and review,\(^{44}\) “it is not at all unusual or unexpected that parents become the adversary of the district, sometimes to the point of ‘irreconcilable differences’…”\(^{45}\) In short, due process hearings are not necessarily conducive to preserving long-term relations.\(^{46}\)

---

\(^{42}\) The AASA actually asserts that there is no research showing that a hearing makes a difference in educational outcomes. Pudelski, supra note 35 at 7. Professor Weber raises questions about the validity of that finding. Weber, “Due Process, supra note 32 at 518.

\(^{43}\) Steven Marchese, “Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities under the IDEA” (2001) 53 Rutgers L Rev 333 at 351. See also, Marie Gryphon & David Salisbury, “Escaping IDEA: Freeing Parents, Teachers, and Students through Deregulation and Choice” (Washington, D.C.: Cato Institute, 2002) at 5 (“IDEA’s single worst feature is its propensity to turn would-be allies — parents and special educators — into the equivalent of fighting dogs…”). For a particularly nightmarish rendition of due process run amok, see Lanigan et al, supra note 31 at 220-25 and Rosenfeld, supra note 33 at 366. In her discourse on the “legalization” of public education, commentator and parent Carrie Basas observes that “[p]lacing teachers and school administrators in the roles of de facto lawyers can enhance anxiety and conflict in the system, particularly in interactions with families and students.” Basas, supra note 20 at 42.

\(^{44}\) S Rep No 168, 94th Cong, 1st Sess 11 (1975), reprinted in [1975] USCCAN 1425, 1435 (intent that local educational agencies “ensure adequate involvement of the parents or guardian” throughout the school year). See also, Honig v Doe, 484 US 305 at 311 (1988) (IEP is “centerpiece of the statute's education delivery system”).

\(^{45}\) Perry A Zirkel, “A Special Education Case of Parental Hostility” (1992) 73 West Ed Law Rep 1 at 9. The degree of parent hostility vis-à-vis the school district was at the heart of one appellate court’s examination of the impact of the parent-school relationship on the educational benefit analysis. Board of Education of Community Consolidated School District No 21 v Illinois State Board of Education, 938 F (2d) 712 (7th Cir 1991), cert denied, 502 US 1066 (1992). “[S]chools tend to appreciate cooperation and obedience over recognizing parents as equal power holders.” Basas, supra note 20 at 47 (footnote omitted). Although she was citing education professor Camille Wilson Cooper on attempted partnerships between African-American mothers and school authorities in other contexts, Basas’ observation rings true for the special education parent-school relationship as well.

\(^{46}\) In one case that ultimately advanced IDEA jurisprudence, the court nevertheless remarked: “It is regretful that this matter has ended up in litigation where the parties are pitted against each other instead of working together. It is difficult to imagine a worse scenario from the point of view of the child.” Oberti v Board of Education, 789 F Supp 1322 at 2337 (DNJ 1992), aff’d, 995 F (2d) 1204 (3d Cir 1993). See also, Clyde K and Sheila K v Puyallup School District No 3, 35 F Supp (3d) 1396, note 5 (9th Cir 1994), where the court opined: “[L]itigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful here, since parents and school officials must—despite any bad feelings that develop between them—continue to work closely with one another.”
IV. PARENTAL INVOLVEMENT IS MOST IMPORTANT AT THE IEP TABLE, EARLY RESOLUTION SESSION OR MEDIATION CONFERENCE

The primary role of enforcing the IDEA falls on parents and their advocates, where available. Parents of pupils with disabilities must negotiate the labyrinth of education law at IEP conference tables, in mediation rooms, or at parent organizing meetings. In a major decision interpreting the IDEA, the U.S. Supreme Court declared that parents “will not lack ardor” in making sure their children gain access to all the educational benefits entitled to them under the Act. While the Court has reemphasized the central role of parental decision-making, it may have overestimated the ability of parents to act on their own. This is particularly true when families are limited by poverty, disability, language barriers, immigration status, or lack of formal education. Even parents who are English proficient and university-educated attorneys can get worn down.

47 The IDEA is one of the best educational initiatives ever hatched by Congress. However, a catchy acronym and an improved and reborn statute (Individuals with Disabilities Education Improvement Act, Pub L No 108-446, 118 Stat 2647 (2004)) are not enough to make up for the longstanding lack of Congressional appropriations. See Wendy F Hensel, “Sharing the Short Bus: Eligibility and Identity under the IDEA”, (2007) 58 Hastings LJ 1147 at 1155, n 47 (Congress has never fully funded IDEA, falling far short of its goal to cover 40% of costs incurred by states). Moreover, a district’s resistance to remediating or otherwise redressing a student’s disability is very often about money and resources. Rosenbaum, “When It’s Not Apparent”, supra note 9 at 174, n 55 (program cost factor is like a big dollar sign hanging over “tiny formica IEP table”).


49 Winkelman v Parma City School District, 550 US 516 at 524 (2007) (noting that the statute lays out “general procedural safeguards that protect the informed involvement of parents in the development of an education for their child”). Although the courthouse door has been opened for non-attorney parents, the undertaking of an administrative hearing, not to mention a federal court appeal, is still daunting.

50 See, Massey & Rosenbaum, supra note 30 at 281-82 and Ruth Colker, supra note 29 at 483-84. Families’ limited economic (and physical and emotional) resources and lack of community supports “need to be leveraged at the same time that they are experiencing confusion, stress, and fear. The relationship between the family and the school community becomes a defensive one at best.” Basas, supra note 20 at 38.

51 See, Massey & Rosenbaum, supra note 30 at 279-81 (lawyers not necessarily adept at advocating for their own children). Disability studies scholar, attorney and parent activist Carrie Griffin Basas has coined the term “advocacy fatigue” to describe “the increased strain on emotional, physical, material, social, and wellness resources that comes from continued exposure to system inequities and inequalities and the need to advocate for the preservation and advancement of one’s rights and autonomy.” Basas, supra note 20 at 52. In a recent e-mail exchange, Basas quipped: “My partner and I have found that cocktails and s'mores are essential elements of ‘therapeutic playgroups’ for the parents of kids with disabilities in our community.” E-mail from Carrie Griffin Basas (12 August 2015) (on file with author). In contrast, the institution-run therapeutic playgroup that my partner and I regularly attended served mediocre coffee and sandwich crème cookies. Stephen A Rosenbaum, “Representing David: When Best Practices Aren’t and Natural Supports Really Are” (2007) 11 UC Davis J Juv L & Pol’y 161 at 169.
Under the IDEA, parents are equal members of the IEP planning team, along with school personnel. To be successful, parents must understand both their children and their children’s disabilities. They also must be able to follow the proceedings of the IEP meetings, voice disagreement, seek clarification, and be willing to use the available procedures to resolve conflicts.

Parents may not have negotiation skills or familiarity with legal terminology. This contributes to the power imbalance, as does their lack of training in evaluating and marshaling evidence. IEP meetings have been described as “highly formal, non-interactive, and replete with educational jargon.” It has long been acknowledged that the stress, frustration, and anger many parents experience may also interfere with their ability to present concerns in due process administrative hearings or mediation. Other characteristics that may interfere with parents’ ability to advocate for an appropriate education for their children include the following: fear of retaliation against the student, a desire to maintain good relations with the school, cultural norms that place educators in positions of unquestioned authority, feelings of shame about having a child with a disability, and a sense of powerlessness. Sometimes parents actually need moral support more than legal advocacy.

It may be naïve to seek a change in school culture, in which the family and educational authorities engage in dialogue more than argument, and collaboration more than confrontation. It is a vision that actually matches that of the school administration petitioners in Goss v. Lopez, the Supreme Court’s landmark case on school suspensions. The administrators in that case conceived of the school as a “community” or “family” of shared interests. As Martha Minow later described, this is a conception whose defenders fear that the “[c]ontinuing relationships among people with shared interests would be frustrated by the formality and distance imposed by legal procedures—that is, by rights.” While this view of schools was not adopted by the Court majority, the dissent embraced it, referring to the student-teacher relationship as one that “is rarely adversary in nature” and “in which the teacher must occupy many roles—educator, adviser, friend and, at times parent-substitute.”

---

52 There are extensive procedural protections for parents as the educational representatives of their children. 20 USC § 1415 (2012); 34 CFR §§ 300.500–.505 (2014).
54 Kotler, supra note 39 at 331, 364; see also Marchese, supra note 43 at 333, 351 (remarking that parents must face school officials “often speaking to each other in technical terms”).
56 Rosenbaum, “When It’s Not Apparent”, supra note 9 at 166, 176–81.
60 Goss v Lopez, 419 US 565 at 593-94 (1975). The administrators’ concern was not shared by the Court’s majority. In his dissent, Justice Powell regretted “a recognition of rights as defining and accentuating the
V. PRIVILEGING PROFESSIONAL JUDGMENT

In most transactions with service providers, we give deference to the opinions of professionals—be it health care, construction, design, accounting, exercise, real estate, nutrition, tutoring, insurance or legal advice. We want to have quality treatment or service from individuals with expertise and experience. We want communication in a language we can understand and candour. As with all professional relationships, we do expect to be adequately informed, before giving consent to particular educational interventions, and to be respected and heard on matters in which our observations or opinions may be relevant. To confirm advice, increase options or change a service provider, we may also seek a second opinion or an independent evaluation.

The opinions of credentialed and experienced educators should not be treated differently from those of other professionals. There is no reason to think that a parent or judge knows more than a teacher or specialist about formally educating a child—particularly a child with a disability—unless he or she has equivalent or superior knowledge and experience. Therefore, when there is disagreement between educators and parents about a pupil’s instructional program for the upcoming school year, the ultimate decision-maker should be a professional with expertise in education or disability.

In its landmark Romeo v. Youngberg decision, the U.S. Supreme Court held that “courts must show deference to the judgment exercised by a qualified professional” in determining the training or treatment due an individual with disabilities. Moreover, “the decision, if made by a professional, is presumptively valid…” It is important to distinguish the two Constitutional claims that the Court examined in Youngberg: The institutionalized individual’s right to freedom from state interference, which all persons enjoy and which survives institutionalization, and the right to “treatment,” an affirmative right to adequate services from the state that arises out of institutionalization.

distances between people, seeming to pin students in adversarial relationships to teachers and school administrators.” Although the context for the Court’s analysis was the suspension process and schools’ ability to freely discipline, it offers an appealing alternative to the typical special education scenario, i.e., disabled pupils and their parents in opposition to school administrators. The lower court in Goss asserted that “[t]he primacy of the educator in the school has been unquestioned by the Courts.” Lopez v Williams, 372 F Supp 1279 at 1300 (SD Ohio 1973).


This option may be constrained, of course, by public sector personal finances, referral policies and/or availability of other professional providers.


The Supreme Court’s deference—an adoption of the circuit court’s standard—should be seen in the context of a state institution for persons with developmental disabilities, where deprivation of liberty and “minimally adequate treatment” were the predominant factors. Nevertheless, there is an appeal to a standard that relies on qualified professional assessment in other settings devoted to instruction or training.

Youngberg, supra 63 at 322-23.

constitutes adequate (or appropriate) educational services, that is at the heart of challenges made against local school authorities. Professor Michael Perlin argues further that the professional judgment standard “sharply limits the need to inquire into the adequacy of a [person]’s treatment.” Thus, when parties cannot otherwise agree, the final word on placement and services for the current or upcoming school term should come from an education expert, not a jurist. The former is better suited to thoughtfully design an educational plan and designate outcomes and should not be mistrusted, unless there is a reasonable suspicion of incompetence, negative attitude, inattentiveness, or inappropriate behaviour.

However, it is not simply enough that an opinion be rendered by a professional. The Youngberg majority and Chief Judge Seitz’s concurring opinion in the Court of Appeals “envisioned the possibility of decisions by professionals that were unqualified or suspect insofar as they departed from ‘professional judgment, practice or standards.’” In addition to their expertise and experience, the deference due professionals is predicated upon two assumptions:

1. The first assumption is that to act professionally is to act neutrally, objectively, and non-ideologically, with the primary motivation of furthering the patient’s best interests. Second, the Court assumes that professionalism transcends the gulf between the public and private spheres for both the professional and the patient, so that no difference exists between the actions and standards of public professionals treating public patients and those of private professionals treating private patients.

---

67 Michael L Perlin, The Hidden Prejudice: Mental Disability on Trial (Washington, D.C.: American Psychological Association, 2000) at 122. See also, Saint Louis Developmental Disabilities Treatment Centre Parents Association v Mallory, 591 F Supp 1416, 1476 (WD Mo 1984) (“due deference should be given to the decisions made by the professionals working in the institution…”), aff’d, 767 F (2d) 518 (8th Cir 1985); Wynne v Tufts University School of Medicine, 932 F (2d) 19 at 25 (acknowledging need “to accord some measure of judicial deference to program administrators, but reject[ing] ‘broad judicial deference resembling that associated with the ‘rational basis’ test [which] would substantially undermine Congress’ intent … that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs.”) (internal citation and footnote omitted), 26 (“substantial departure from accepted academic norms,’ is not necessarily a helpful test in assessing whether professional judgment has been exercised) (1st Cir 1991) (en banc).

68 See, e.g. Anne P Dupré, “Disability, Deference, and the Integrity of the Enterprise” (1998) 32 Ga L Rev 393 at 445-46, n 294 (IEP team forum is overtaken by protracted legal battles in which parents challenge academic judgment of other team members). It is common sense that teachers and educational professionals are well-placed to know what help students need. See, e.g. Doron Dorfman, Reframing Learning Disabilities – Alternatives to the Learning Disabilities Evaluations Requirements of the IDEA (2014) at 23-24 [unpublished on file with author].


70 Stefan, “Leaving Civil Rights”, supra note 66 at 654-77. Stefan, a long-time public interest attorney, may make too much of the public and private sector dichotomy in decision-making. In the educational context, Professor Weber also cautions against reliance on the “‘trust us’ approach” whereby school district decision-making about FAPE may be subject to budgetary and other pressures and not in accordance with the law. Weber, “Due Process”, supra note 32 at 516. Whereas professionals employed by public sector institutions may be subject to
Commentator Susan Stefan writes persuasively about how personal freedoms can be squelched under the guise of professional treatment or how the professionalism may be otherwise tainted:

“The professionals whose decisions are challenged in these cases are plagued by [budgetary, safety and security] conflicts of interest… and even the best-intentioned are subject to enormous pressure to adjust or dilute their professional standards to conform to inadequate resources and substandard supplies and facilities. The patient’s treatment may not represent the result of a decision or judgment at all, but simply a default in the absence of alternatives.”71

A more radical critique is that professional judgment is per se objectionable, given the authority and oversight historically exercised by medical personnel, therapists, social workers, educators and all manner of administrators.72

It is important to untangle the deference accorded professionals in different contexts. For some of the reasons alluded to by Stefan, healthy skepticism should be applied to the opinions of those who practice in institutionalized settings (such as hospitals or prisons), in circumstances when their expertise infringes on the personal autonomy of disabled individuals, to the point of inflicting physical or psychological injury (e.g. forced medication or use of restraints or seclusion). Likewise, we should not embrace the opinion of a professional when it is influenced by the limited financial resources of an establishment, such as a school district.73 These are instances in which professional judgment must be tempered by other considerations and reliance on other assessments or opinions. However, it is overreaching to equate an educator’s decision about what constitutes appropriate curriculum for an individual student during the academic year as necessarily a matter of liberty interest.

I am not suggesting that professional voices should always be heard above those of people with disabilities. I merely propose that in the discrete matter of developing and implementing a child’s educational program, where there is no agreement between the (parents of a) disabled student and school administration—and absent allegations of a abuse or constraints on liberty—an experienced and knowledgeable educator is best positioned to make a decision.

subtle fiscal pressures or programmatic bias, this predisposition would hopefully be mitigated on the part of a special master conducting a review under the scheme proposed in this article.

71 Stefan, “Leaving Civil Rights”, supra note 66 at 691 (footnotes omitted).

72 In Stefan’s words, the disabled person’s “voice is so completely silenced” vis-à-vis the professional’s. Ibid at 680. After hearing my proposal about deference to professional judgment, a horrified veteran disability rights attorney, teacher and former colleague approached me with a Munchian Scream expression to remind me that the Independent Living Movement was fueled in large part by a rejection of professional control over disabled lives. Conversation with Arlene Mayerson, Disability Rights Education & Defense Fund Managing Attorney (5 December 2014). I respect her position and interpretation of the Movement. As I attempt to explain in this article, our differences are really about the decision-making context and the degree of deference.

73 Stefan acknowledges that because individuals (in a facility) are legally entitled to treatment of some kind does not mean they will receive a particular treatment. That is a determination that “appropriately involves professional judgment…” Stefan, ibid at 690.
VI. PREFERING A NON-ADVERSARIAL MODEL

The term inquisitorial is “nebulous and can carry a range of possible meanings.”74 Robert Thomas’ taxonomy goes from “soft” inquisitorial, in which judges ask a few questions or investigate issues with assistance of counsel, to “fully” inquisitorial, in which they take charge.75 In the United Kingdom, a hybrid “enabling approach,” recommended particularly for unrepresented parties appealing against regular respondent government agencies, is gaining particular popularity where there are cutbacks in publicly funded counsel76. “Active adjudication” is how Samantha Green and Lorne Sossin describe a hybrid model.77 Characterized in part by tribunal-led focus of the issues and facilitating the production of evidence (including early disclosure), active adjudication is said to enhance the efficiency, fairness and effectiveness of tribunals in ways that are neither purely adversarial nor inquisitorial.78 Rather than viewing their mandate as “truth seeking,” active adjudicators see it as “problem-solving.”79

---

74 Robert Thomas, “From “Adversarial v Inquisitorial” to “Active, Enabling, and Investigative”: Developments in UK Administrative Tribunals,” in Jacobs & Baglay, supra note 19 at 51-52.
75 Thomas states that the descriptors adversarial and inquisitorial do not really capture the nature of the administrative process, which ranges from passive or reactive to proactive or intrusive, or the evolving “enabling approach.” Ibid at 52. “Inquisitorial” sometimes raises eyebrows amongst the uninitiated, inaccurately conjuring up techniques advanced by Tomás de Torquemada—Spain’s notorious Inquisitor General and master of torture—rather than those put forth by Robert Thomas et al. See Robin Creyke, “Pragmatism v Policy: Attitude of Australian Courts and Tribunals to Inquisitorial Process” in Jacobs & Baglay, supra note 19 at 29.
76 Thomas, supra note 74 at 52. Thomas goes on to suggest that the adversarial-inquisitorial dichotomy is no longer “insightful” and that an “active, investigative, or intrusive adjudication” model is what is required. Ibid at 61.
77 Green & Sossin, supra note 19 at 71.
78 Ibid at 72. The authors also use the labels “adversarial” and “non-adversarial” to contrast the two standard procedural models, noting that most Commonwealth adjudicative tribunals use a mixture of the two. Ibid. In the Introduction to their comprehensive tome on global administrative perspectives, Laverne Jacobs and Sasha Baglay comment upon the rarity of “pure adversarial or pure inquisitorial decision-making systems” and the worldwide trend toward mergers, Jacobs and Baglay, “Introduction”, in Jacobs and Baglay, supra note 19, 1 at 6, cross-fertilization of legal traditions and hybridized hearing processes, Ibid at 9, 25. See also, Esin Örücü, “A General View of ‘Legal Families’ and of ‘Mixing Systems’” in Esin Örücü & David Nelken, eds, Comparative Law: A Handbook (Oxford: Hart Publishing, 2007) 169 (tracing classification of legal systems through diffusion, transposition, transplantation and other modes of cross-fertilization and -pollination).
79 Green & Sossin, supra note 19 at 75. Some commentators observe that the adversarial process “is habitually seen as the ‘gold standard’” for producing and testing evidence, Thomas, supra note 74 at 61, and that “adversarial combat,” especially cross-examination, is favoured by many Americans as the best way to seek truth. Michael Asimow, “Inquisitorial Adjudication and Mass Justice in American Administrative Law”, in Jacobs & Baglay, supra note 19, 93 at 110. However, to succeed, Professor Asimow asserts that there must be “a rough equality” between contenders in lawyering skills and resources, which is often not the case. Ibid. In her account of inquisitorial processes in US courts of equity, Professor Amalia Kessler reminds us that “contrary to the widespread assumption today, inquisitorial modes of adjudication are not entirely alien to our legal culture.” Amalia Kessler, “Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial” (2005) 90 Cornell L. Rev 1181 at 1210-11. See also, Resnik, supra note 19 at 382, 438-39 (American experience with non-adversarial models of judging in different forums).
Thomas, a Manchester University Professor of Public Law, cautions against generalizations and sets out a number of factors that should guide the selection of an appropriate administrative adjudicatory approach. For special education matters, he cites decisional law favouring an inquisitorial over an adversarial model because the tribunal is likely to have greater expertise than parental parties, and must not rely only on the evidence put forth by the parties. Other factors to be considered, aside from court decisions, are emphasis on burden of proof, applicability of evidentiary rules, whether the parties are represented, judges’ preferences, timelines for issuing decisions and tribunal culture.

VII. ELEMENTS OF A NEW PROCESS OF IDEA ADMINISTRATIVE REVIEW

The review process that I propose to replace the current IDEA procedure would not necessarily involve a hearing, but should contain the following seven elements:

1. A review conducted by a “special master” who is an experienced special educator or disability specialist (not affiliated with any school district) or a special education academic. In some jurisdictions that use this model for benefits determination, the inquisitorial decision-maker is a jurist assisted by a specialist in areas such as education, mental health, social security, employment or immigration. My preference is for a

80 Thomas, supra note 74 at 55 (citing W v Gloucestershire County Council, (2001) EWHC Admin 901 at 15). Socio-legal scholar Robert Kagan has enumerated the traits that distinguish bureaucratic legalism from adversarial legalism, some of which are relevant here. The former is characterized not only by a built-up caché of government expertise, but official responsibility for fact finding, judicial domination and a restricted role for judicial policymaking of the adjudicative process. In contrast, adversarial legalism is marked by a greater role for lawyers, through litigant and lawyer activism, fragmented authority, and greater responsiveness to legal and political advocacy at all levels of decision-making. Robert Kagan, “The American Way of Law: On Surveying the Whole Legal Forest” (2003) 28 Law & Soc Inquiry 833 at 834 (Review Symposium on Kagan’s Adversarial Legalism).

81 Thomas, supra note 74 at 55. In an overarching analysis, legal historian Philip Hamburger actually criticizes the administrative decision-making process for its “evasion of the Bill of Rights.” Philip Hamburger, “The History and Danger of Administrative Law” (2014) 43:9 Imprimis 1 at 1.5. Hamburger traces the origin of today’s rules and regulations to the proclamations and decrees issued under prerogative power of English kings, outside the presence of juries and “real judges.”.

82 “Master” evokes the image of a master teacher, but also has meaning in the judicial oversight process. I would prefer a better title for this expert, and welcome any recommendations. My former student Kip Hustace has suggested “independent educational reviewer,” “independent reviewer” or “education plan reviewer” as alternative titles. On the value of an educator over an ALJ, see, e.g. Colker, supra note 29 at 482, 487 (account of two hearing officers whose judicial orientation does not allow them to properly evaluate the evidence).

83 See e.g. Thomas, supra note 74 at 53. In Ontario, Canada, a majority of the Special Education Tribunal Members are in fact current or former educators; only a handful of Members are lawyers. The Tribunal sits in panels of three, but it is not obvious whether each panel must have at least one Member with a legal background. See supra note 2. In the United States, there are jurisdictions where the due process hearing officer is not required to be a lawyer. In Pennsylvania, e.g., one of the state’s seven due process hearing officers has a background in clinical psychology, rather than law, online: The Office for Dispute Resolution <http://odr-pa.org/due-process/hearing-officers/>. This is consistent with federal regulations, although the latter do call for hearing officers to be familiar with IDEA and federal and state regulations and “court interpretations” as well as
single reviewer, and one whose expertise is in education rather than law. Of course, they are free to consult with other educational experts or colleagues who form part of a state or national corps of special masters or reviewers. The most qualified person for this position is someone who has experience both in training special education teachers and in the classroom, or in some other instructional or therapeutic capacity in a school district. Affiliations with universities are desirable. The special master might even be selected from a national or state registry, if that were to insure the availability and high calibre of reviewers. However, it is important that there be no current employment or contractor relationship with any district.

2. A review based on the “record” below (e.g., IEP, evaluations and meeting notes), with the possibility of augmenting the record. Standard appellate practice is to allow in information not available to the parties before the review was requested, but a more liberal rule could be adopted by the special master at his discretion, or by the administrative review office as a matter of policy. That is, the parties could be allowed to submit new documents or even testimony to be examined by the special master. Under current disability claims procedures of the Social Security Administration [SSA], for example, the record remains open on cases appealed to the Appeals Council. Other inquisitorial characteristics include the SSA’s obligation to order and pay for additional examinations. Furthermore, the ALJ has an obligation to develop the record at the hearing and call additional witnesses or obtain reports.

3. Early disclosure to the special master (including additional areas to be covered or witnesses to be called) should be encouraged. This allows for the review to be more efficient and focused and is a recognition that instruction or services that were earlier considered or disputed may evolve or shift with the passage of time between the initiation of the IEP process and the special master’s decision.

4. A special master will adapt to the needs of the parties to ensure meaningful access. This means the master will have broad powers over the process, including how hearings are

---

84 The AASA has recommended a procedure to replace the due process hearing that also relies on a non-lawyer who is an educator. Under its proposal, this “consultant” must be mutually agreeable to the parties. The “ideal candidate” would be someone on a statewide list, affiliated with a higher education institution, who has expertise in the student’s primary disability and experience in teaching or administration in a program for youngsters with that disability. Pudelski, supra note 35 at 20. The Association’s candidate would be disqualified for even a past contractual relationship with the local school district in question, or contract with a parental advocacy group.

85 Asimow, supra note 79 at 101. The Appeals Council, soon to be phased out and replaced by a Decision Review Board, decides matters based on the written record. 71 Fed Reg 16, 424, 16, 437 (2007).
conducted. In Canada’s refugee claim procedure, for instance, the Refugee Protection Division is instructed to “deal...as informally and quickly as the circumstances and the consideration of fairness and natural justice permit.”

5. A special master would determine the focus of issues for review. In many instances, they would rely on the information supplied by the parties and their own expertise. They should actively manage the case, have broad powers over any hearing, including limiting the examination of witnesses and claimants, and questioning parties before the counsel ask any questions. The special master would be able to engage in independent fact-finding and request additional information on his own motion. In order to give the master flexibility in resolving disputes there should be less emphasis on a single determinative hearing. Expeditious decision-making and instituting a less litigious process are also important objectives. These can be facilitated through written submissions in lieu of oral proceedings and a limitation on oral argument, new “testimony” and “cross-examination.”

6. An advisor may accompany a party to a hearing or meeting with the special master. This is actually the current practice of the Ontario Special Education Tribunal, which distinguishes between a legal “representative” and a non-legal “support person.” The former may be a lawyer, licensed paralegal or legislatively sanctioned legal services advisor who communicates with the Tribunal and presents her client’s case, at the client’s direction. The latter is a family member, friend or NGO volunteer who “attends the

---

86 Gerald Heckman, “Inquisitorial Approaches to Refugee Protection Decision-making: The Australian Experience and Possible Lessons for Canada,” in Jacobs & Baglay, supra note 19, 125 at 145-6 (citing Immigration & Refugee Protection Act, SC 2001, c 27). See also, Rosenfeld, supra note 33 at 375 (suggesting minimalist and confidential record in voluntary arbitration proceedings—held in lieu of special education due process hearing—in order to have less “target” for procedural appeals).

87 Active management will depend in large part on whether there are resources at the disposal of the administrative case reviewer. Thomas, supra note 74 at 6. Tribunal members’ preferences, the parties’ relevant knowledge and experience; and complexity of case are also factors that dictate the degree of management. Green & Sossin, supra note 19 at 74.

88 Heckman, supra note 86 at 146. Canadian courts have determined that procedural fairness is not compromised by the order of questioning (e.g., in refugee claims, the hearing officer begins before counsel for the claimant or claimant himself). Ibid at 148-49; Green & Sossin, supra note 19 at 76-79, n 14. The hearing officer may also take note of any judicially noticed facts and any opinion or information within her “specialized knowledge.” Immigration & Refugee Protection Act, SC 2001, c 27, s. 170 g, cited in Green & Sossin, ibid at 77, n 22.

89 For example, under the 2001 Immigration & Refugee Protection Act, certain claims for refugee status to an appellate division of Canada’s Immigration and Refugee Board are decided on the record, unless the appeals panel decides to conduct an in-person hearing. Heckman, supra note 86 at 148. See also, Green & Sossin, supra note 19 at 72-73 (discussing limitations on appellate oral argument, introduction of new witnesses and cross-examination in Canadian administrative jurisprudence and Australian Law Reform Commission practice). The record below is not a verbatim transcript and there is no examination of witnesses per se. However, IEP meeting notes, teachers’ assessments and reports submitted by specialists are the functional equivalent.
hearing to provide moral support and assistance to the parents.” In Australia, an asylum applicant may be accompanied to the appellate review tribunal by an advisor “who can clarify or raise specific points, but who may not examine the appellant or make extensive submissions.” In the United States, the Veterans Affairs claims adjudication practice has been “delawyered,” as claimants are usually accompanied at the agency’s initial and appellate levels by lay representatives. While lawyers should not necessarily be prohibited from appearing in the process that I propose, they should be subject to the master’s determination as to how the hearing will be conducted, including the manner of examination and order of questioning, the introduction of new documents or witnesses, and the need for opening statement or argument. Again, discretion must be left to the special master to decide the terms of engagement, keeping the focus on the child’s program and parental input.

7. Decision-making timelines should be short and delays minimized. This is commonsensical and uncontroversial, given that any curricular adjustments will take time. The school year, on which the whole IEP dispute is based, is not really an adequate period for making changes in placement, instructional interventions or compensatory relief. Despite general agreement about the need for expedited decisions, the problem lies in genuine implementation of this principle. Under the current due process scheme, even without extensions, the relief can be meaningless or anti-climactic, and the focus of the dispute can shift from the pupil’s needs to the underlying conflict between adults.

---

90 Ontario Special Education Tribunal, Starting An Appeal (Information Sheet 2) 11-12, online: Social Justice Tribunals Ontario< http://www.sjto.gov.on.ca/oset>. Note that this information sheet for parents also states: “The Tribunal does not require or expect that parties will be represented at a hearing. Parties may be self-represented or they may rely on someone to help them to prepare for and participate in an appeal to the Tribunal.” Ibid at 11 (emphasis added). Lay advocates and other family or friends could be supportive for parents who are reticent to speak in public, much less advocate for themselves or their children. But, like the lawyers, they too will need to be restrained from any tendency to dominate, deter or distract.

91 Asylum Research Project, Providing Protection: Towards Fair and Effective Asylum Procedures: Report and Recommendations from the JUSTICE/ILPA/ARC Asylum Research Project 57 (London: The Society, 1997). See also Heckman, supra note 86 at 129. In their report on the UK asylum system, three NGOs jointly examined various models for adjudicating claims. Among their recommendations were that adjudicators be encouraged to define the scope of disputed issues, use their existing powers to guide argument, and carefully elicit information (particularly from vulnerable or unrepresented claimants). They also commented on the need for effective and continuing training of adjudicators. JUSTICE/ILPA/ARC at 55-58.

92 Asimow, supra note 79 at 105.

93 Ibid. The representatives are provided by advocacy service organizations at no cost to the claimant.

94 This would be an atypical “back seat” role for American attorneys in administrative forums. The objective is neither to muzzle them, nor to encourage their involvement as quasi-trial lawyers, as that would only heighten the litigious and adversarial nature of the review.

95 Rosenfeld’s arbitration proposal, while allowing for some exceptions, calls for issuance of the arbitration panel’s decision within 30 days, supra note 33 at 374. Under AASA’s scheme, the consultant must draft a report within 21 days of his initial meeting with the parties. Pudelski, supra note 35 at 20.

96 Rosenfeld, who has trained hundreds of hearing officers and administrative law judges, observes that “[f]or many, if not most, a final decision will come well past the time it can be of any benefit to the most important
While there are features in this model that resemble those laid out in Rosenfeld’s arbitration proposal, there are also some distinctions. First, under this model, decision-making is in the hands of an expert educator, not a judge. Second, there is a single “decider”—not a panel. Third, a decision may be made entirely on the record from below, with no hearing or appearance by parties. Fourth, if a hearing is required, the special master will control the process, leaning much more toward an inquisitorial than adversarial approach. Fifth, if attorneys do appear, they are subject to the discretion of the master in terms of how the hearing is conducted. Sixth, this administrative step is not in lieu of mediation, but is reserved primarily for cases where the mediation conference ends in failure. Finally, unlike the decision of the arbitrators in Rosenfeld’s scheme, the decision of the special master is not binding. Under the model presented here, the parties would be free to appeal or otherwise petition, in certain circumstances, to set aside the special master’s decision in a court of law.

The plan also differs from AASA’s consultancy proposal insofar as parties would not select the decision-maker and that person need not have a background in the disability of the student in question. These requirements, while perhaps desirable, could cause delay in selecting the third party reviewer and could lead to a subsidiary dispute regarding qualification or mere selection of a mutually acceptable reviewer. As noted above, the special master might be selected from a registry of reviewers. There would not necessarily be a face-to-face with the parties, which is why facilitated IEPs and mediation should still be heavily encouraged. Finally, under the model 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…” Rosenfeld, supra note 33 at 367-68. The AASA’s analyst describes the process as “argu[mens] over whether the school district erred in designing or administering the original IEP or whether the parents’ demands for services and placements are unreasonable… [or]whether the district abided by the hundreds of paper-based compliance metrics under state and federal law.” Pudelski, supra note 35 at 21.

97 For an explanation of the arbitration panel proceedings see Rosenfeld, supra note 33 at 69-80. Even though there are many features in his proposal that I actually endorse, at one point, I envisioned writing a rebuttal entitled Rosenbaum Responds to Rosenfeld.

98 Professor Rosenfeld is not enamoured of the mediation process, which 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.” Ibid at 365-66. For a positive perspective on mediation, facilitated IEP meetings and the varied forms of special education alternative dispute resolution, see, e.g. Steven S Goldberg & Peter J Kuriloff, “Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education” (1987) 42 W Ed Law Rep 491 at 492-93; Erlichman, Gregory & St Florian, supra note 18 at 412-28; Pudelski, supra note 35 at 17-20. The Center for Appropriate Dispute Resolution in Special Education [CADRE], whose mission is “to increase the nation’s capacity to effectively resolve special education disputes, reducing the use of expensive adversarial processes," has been a font of creative mediation and other ADR resources for many years, online: CADRE <http://www.directionservice.org/cadre/about.cfm>. Facilitated IEP meetings are also strongly endorsed by the national superintendents’ association. While veteran commentator Weber recognizes the value of facilitated IEPs and mediation, he asserts that these and other alternative forums all depend on the option of due process not being “off the table.” Weber, “Due Process,” supra note 32 at 524. Having formal legal recourse as a “backstop of coercion,” ibid, for parties engaged in informal dispute resolution is a point well-taken. However, the coercion or incentives to settle (or not) will still be in place with the option of the special master review or a judicial appeal.

99 See supra note 84.
here, the special master has an authority that the consultant does not, in terms of being able to order additional services or instruction, placement change or compliance with the status quo.

Notwithstanding these distinctions, there are components in both of these proposals which are in common with the one I am putting forward here: relying on the decision-maker’s educational expertise, possibly dispensing with an adversarial hearing, imbuing the decision-maker with some inquisitorial traits (including development of the record), and expediting the administrative review. In any event, these proposals are worthy of consideration in whole or in part, and are also amenable to experimentation on a pilot basis.

VIII. LIMITED JUDICIAL REVIEW

An appeal from the special master’s decision is arguably problematic under the schema just described and raises a number of questions. First, what is the educational interest to be protected against wrongful deprivation? Second, what standard of review should be applied by the court? Third, what constitutes the record to be reviewed?

As noted above, most IDEA disputes are about what constitutes Free Appropriate Public Education or Least Restrictive Environment, the placement or related services. This is distinct from a challenge to suspension, expulsion or aversive behavioural interventions, or from claims regarding the habilitation or programming (or lack thereof) provided persons in state hospitals, correctional centres or other custodial settings. Lastly, allegations of disability-based discrimination, including unwarranted segregation or warehousing at school sites, can be challenged under Section 504 or, in some instances, under Title II of the ADA.

In most cases there is no liberty or property interest worthy of Constitutional protection. As noted above, the student who is excluded from school through suspension or expulsion, and deprived of his right to an education, is entitled to ample procedural safeguards under federal and

---

100 Even in cases that squarely challenge a violation of IDEA or ADA integration mandates, the question for review is not about a student’s wholesale exclusion from school or denial of the right to an education, but whether the child is being offered an appropriate education in the least restrictive environment. The well-settled case law rests on such factors as meaningful educational and non-academic benefit, effect of student on teacher and other children and meaningful participation in the IEP process. See e.g. Rowley, supra note 48 and progeny; Daniel RR v State Board of Education, 874 F (2d) 1036 (5th Cir 1989); Oberti v Board of Education, 995 F (2d) 1204 (3d Cir. 1993); Sacramento City Unified School District v Holland, 14 F (3d) 1398 (9th Cir 1994); and Beth B v Van Clay, 282 F (3d) 493 (7th Cir 2002). While fact-specific and maddeningly ambiguous, these criteria are best reviewed by an education professional, such as the special master proposed in the scheme above.

101 Disability anti-discrimination and anti-harassment complaints may be addressed to the regional Office for Civil Rights, US Department of Education. See, *Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance*, 34 CFR §104.1 et seq (2014). On the interrelationship between IDEA and section 504 and their utility of behalf of disabled students, see e.g. Christopher J Walker, “Adequate Access of Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School” (2006) 58 Stan L Rev 1563 at 1580-96. Title II is the Congressional prohibition on benefits denial and exclusion from participation faced by individuals with disabilities in state and local entities. 42 USC § 12132-12134.
state law, independent of the IDEA due process hearing. Should this student contest a finding by the school district that his conduct was not a manifestation of his disability,102 the special master would be competent to review that finding, once again relying on professional judgment, not judicial temperament. The only liberty interest arguably at stake is that of the student who is subjected to aversive behavioural interventions, including restraints or seclusion. Like the suspended or expelled student, she too may seek relief that bypasses the special master review.

Thus, it can be argued that the administrative review need not necessarily contain the procedural safeguards of a “fair hearing” as set out in the landmark Goldberg v. Kelly103 and Mathews v. Eldridge104 opinions and embodied in the due process hearing currently provided under the IDEA. As noted above, there are a number of procedural protections already afforded the pupil and his parents before a matter would even come up for review by a special master. These range from the right to have one’s child assessed for suspected disability, to call an IEP meeting with 30 days’ notice, to receive independent evaluations of disability and appropriate services, to file complaints of non-compliance, and to attend a mediation conference.105 In the vast majority of cases, the parties do not pursue channels beyond those afforded by the school district.106 Moreover, federal and state law strongly encourage alternative means of resolving disputes, principally through the services of trained mediators, at no cost to the parties.107 Thus, it is preferable to leave the review process in the hands of an education or disability professional rather than a jurist.

Professor Stefan is right to worry about the opaqueness that envelops professional decision-making from the vantage point of the judiciary, and the collapse of procedural and substantive due process inquiries.108 But, the concern about courts “rais[ing] a white flag in the face of subjective, interpretive decisions”109 is far greater in cases where the opinions of treating professionals are contested by incarcerated or institutionalized persons. In such instances, the quality or invasiveness of the treatment, program or interventions is not easily separated from the involuntary confinement, and the alleged constitutional violations do indeed warrant judicial scrutiny. By contrast, the typical IDEA dispute is about the appropriate instruction and related services offered in a school setting.110 Still, it is difficult to conceive of Congress foreclosing a judicial avenue to challenge an educational program decision opposed by a student or her parents, particularly under a radically amended IDEA that dispenses with the standard due process hearing. For the model of administrative review set out above to succeed, with few incentives to routinely appeal, there must be confidence in the procedures at the administrative level—and limits on the review conducted by the courts.

105 See supra notes 26-27 and 37 and accompanying text.
106 See Ehrlichman, Gregory & Florian, supra note 18 at 408-09, n 11.
107 20 USC §1415(e) (2012).
109 Ibid at 680.
110 See supra note 73.
The next critical question is what standard of judicial review should be applied? One can look to both U.S. and Canadian law for an array of standards on administrative appeals. Currently, IDEA requires that the court base its decision to uphold or reverse an administrative law judge’s ruling on the preponderance of the evidence and the U.S. Supreme Court has held that courts must give “due weight” to judgments of education policy when reviewing state hearings under IDEA. The Ninth Circuit has since ruled that “courts should not substitute their own notions of sound educational policy....”

The First Circuit has adopted a more nuanced position: The trial court must recognize the administrative agency’s expertise, “consider the [agency’s] findings carefully,” and “endeavor to respond to the hearing officer’s resolution of each material issue...” However, the court “is free to accept or reject the findings in part or in whole.” Whether or not this (obiter) dicta is the prevailing view in other circuits, it underscores the difficulty of prescribing a standard of review—by statute or case law—and having confidence that judges will follow it.

The Canadian Supreme Court’s candid acknowledgement of the need to “develop a principled framework that is more coherent and workable” for judicial review of agency decision-makers has resulted in a reduction and, arguably, a clarification of standards of review. In a 2008 decision, the Court announced just two standards: correctness of the decision or the more deferential reasonableness standard. The high court’s rationale for applying the reasonableness standard seems à propos for the kind of decisions to be rendered in an IDEA administrative review:

...[D]eference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the [country’s] constitutional system.

The Court stated further that the reasonableness standard should be employed where an administrative body “is interpreting its own statute or statutes closely connected to its function,

---

112 Rowley, supra note 48 at 206.
113 Gregory K v Longview School District, 811 F (2d) 1307 at 1311 (9th Cir 1987) (citation omitted). Troubled by the district court’s lack of factual or legal basis for overturning the hearing officer, the appellate court went on to say that the “due weight” standard “should prompt courts in the future to provide a more thorough explanation when reversing an agency’s ruling on the appropriateness of a special education placement.” Ibid at 1314.
114 Town of Burlington v Department of Education, 736 F (2d) 773, 792 (1st Cir 1984), aff’d 471 US 359 (1985).
115 The First Circuit prefaces its instruction by stating: “The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply.” Ibid at 773 (emphasis added).
116 Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190 at para 32 (per Bastarache and LeBel JJ for the majority of the Supreme Court of Canada).
117 Ibid.
118 Ibid at para 49.
with which it will have particular familiarity…” In sum, whether guided by U.S. or Canadian law, deference to administrative expertise and a desire for practical application by the judiciary should be the principles upon which any standard of review is founded.

The final question on appeal from the special master would be: What constitutes the record and will it be adequate for judicial review under a deferential standard? As set out in the IDEA currently, the court is to receive the record of the administrative proceedings and hear additional evidence at the request of a party. If, however, there is a need for the special master to more fully document and record his decision, it is possible that “implanting an adversarial judicial review process” on top of an inquisitorial process may lead to delays and backlogs in the overall review. This is because lengthier administrative decisions may be required to develop a fuller record for judicial review.

In other words, the necessity of a fuller record could undercut the value of the informal, special master-directed approach. One mitigating measure might be to require written findings, with citation to evidence and reasoning adequate for review, only in instances where a party actually files a notice of appeal with the court. This would allow most cases to be decided expeditiously by the special master, preserving the informality and waiver of hearing, and still permit would-be appellants to go forward with a record on appeal if dissatisfied with the decision.

The court would still be free to make its own findings of fact and conclusions of law, if it found the record was not sufficient enough to determine any preponderance of the evidence, much less accord it “due weight.” In lieu of conducting a full-blown evidentiary hearing, the court might require the parties before it to prepare and file excerpts of record or a joint record (supplemented by information not available below) and written arguments. The judge could then decide the matter upon submission or entertain limited testimony and/or oral argument *sua sponte* or upon a party’s request. This would allow aggrieved parties a more robust adjudication and not be overly burdensome to the judiciary.

**IX. REDIRECT FUNDS FROM LAWYERS AND ADMINISTRATORS TO EVIDENCE-BASED RESEARCHERS AND SCHOOL DISTRICT OR CONSORTIUM SPECIALISTS**

A move away from an adversarial administrative hearing practice and culture could mean more public school funds would be devoted to compensation for instructional and specialist personnel, workshops on collaborative educational planning, alternative dispute resolution, or release time for curricular adaptation and parent-teacher conferences. The cost savings to schools could also transfer to the preparation and mentoring of teachers who can become adept at

---

119 *Ibid* at para 54 (citations omitted).
121 Asimow, *supra* note 79 at 108. This observation of the experience under the reform legislation by the former chair of the BVA (Board of Veterans Appeals) and a current BVA judge, may or may not be applicable to the special education review process.
122 In some US judicial circuits, the court’s insistence on every issue being exhausted before a special education appeal will be heard in federal court has added to delay in the due process proceedings. See, Weber, “Due Process”, *supra* note 32 at 519.
individuated instruction, whether their students are deemed gifted or talented, at-risk or special needs. This change in administrative review does not necessarily mean that dollar for dollar there will be a transfer of funds from due process litigation and liability insurance budget to classroom or school-based teaching and services or other forms of school-based advocacy and collaboration.\textsuperscript{123} But, the potential for redirecting expenditures would be enhanced. Presumably, parents would also realize savings insofar as they would avoid lawyers’ fees and perhaps utilize those savings to pay educational specialists for supplementary services or assessments.

The reality is that most teachers enrolled in teacher training programs are offered an infinitesimal amount of course work related to special education methodology.\textsuperscript{124} Every prospective teacher—and administrator—entering the university ought to have courses in special education, instead of choosing at the outset of their credential program between a general educational curriculum and a special education emphasis.\textsuperscript{125}

The true success stories in special education are not about voluminous and well-crafted “Cadillac” educational plans,\textsuperscript{126} but are derived from the interventions and support provided by qualified, creative and compassionate teachers, other professionals and paraprofessionals—who

\textsuperscript{123} The school superintendents’ association estimates that US school districts spend over $90 million each year in conflict resolution. Pudelski, \textit{supra} note 35 at 23 (citation omitted). “[B]y creating a lawyer-free system for special education disputes, costs for districts will be significantly reduced” \textit{ibid} at 22. See also, Tracy Gershwin Mueller, “Alternative Dispute Resolution: A New Agenda for Special Education Policy” (2009) 20 J Disability Pol’y Stud 4 at 4 (discussing estimated costs of due process proceedings). But see, Debra Chopp, “School Districts and Families Under the IDEA: Collaborative in Theory Adversarial in Fact” (2012) 32 J Nat’l Ass’n Admin L Judiciary 423 at 456 (discussing how coverage of liability insurance for special education defense allows districts “to avoid internalizing all of the costs” of IDEA litigation).


\textsuperscript{126} In keeping with the vehicle motif for special education students, one appellate court declared, in an oft-quoted passage, that under IDEA “the Board [of Education] is not required to provide a Cadillac” to a disabled pupil, but the “educational equivalent of a serviceable Chevrolet.” \textit{Doe v Board of Education of Tullahoma City Schools}, 9 F (3d) 455, 459-60 (6th Cir 1993).
are often overworked and underpaid. “Qualified” here means more than meeting the “highly qualified” certification and licensure standards mandated under the 2004 IDEA reauthorization and No Child Left Behind [NCLB] Act.\textsuperscript{127} This is an intangible characteristic, not subject to testing or in-service training. Civil rights attorney and former state education secretary Thomas Gilhool has called on advocates to engage in a direct action to “support and nourish” special education teachers to demand that they learn to be “effective” teachers to put to use what are known to be effective interventions and strategies.\textsuperscript{128} Genuine collaboration between educators and parents, in classrooms and conference rooms, can likely lead to successful learning outcomes more readily than adherence to the requirements contained in statute books, best practice manuals, and hyper-technical compliance logs.\textsuperscript{129}

X. OBJECTIONS TO NEW MODEL

There are perhaps three basic objections to this departure from the status quo, all of which have been alluded to above. The first is that professional judgment should not trump the judgment of other parties to the dispute, namely parents or pupils with disabilities. The second objection is that articulated by adherents of adversarial legalism: Without an adversarial adjudicatory hearing, and the current procedural safeguards under the IDEA, there is no way to really assure that a student’s right to an education will be secured. The third objection is that there will be no incentive to end disputes at this level of review; parties will simply take their disagreements to the courts.

With regard to the objection rejecting preference for professional judgment, it is important to remember that the special master’s professional or expert opinion that prevails at this level of administrative review is preceded by any number of interventions made by educators and other specialists, along with parents or guardians, able students\textsuperscript{130} and advocates. The master is also free to review evaluations or recommendations from other experts and consult with colleagues in the masters’ offices. It is a mischaracterization to argue that too much control over the pupil’s education or the disabled pupil himself is entrusted to a professional. The control amounts to a decision made by a knowledgeable and experienced individual (who is not affiliated with the

\textsuperscript{127}34 CFR §§200.56 and 300.18 (2014). One of the NCLB Act’s “foundational principles “ was that “teacher quality is the single most important school factor in student success” and that an “effective” teacher means something more than “possess[ing] qualification for entering [the classroom].” The Aspen Institute Commission on No Child Left Behind, Teacher and Principal Recommendations: Effective Teachers for All Students, Effective Principals for All Communities (2007) (emphases in original), online: The Aspen Institute <https://www.aspeninstitute.org/sites/default/files/content/docs/nclb/Teachers_FinalPDF020807.pdf >. A much awaited reauthorization of the Act was signed into law in December 2015. However, under the rebranded Every Child Achieves Act of 2015, the “highly qualified” teacher provisions are eliminated in favour of allowing states more flexibility to determine who should staff their classrooms.

\textsuperscript{128}Rosenbaum, “Full Sp[Ed Ahead” supra note 124 at 387, n 69.

\textsuperscript{129}See also supra note 41.

\textsuperscript{130}While it is rhetorically appealing to champion the primacy of the voice of the disabled student, the reality is that parents speak for all minors in matters of schooling, and almost anything of consequence in a young person’s life. Of course, if they are interested and able, students themselves should be encouraged to meaningfully participate in the planning and execution of their educational programs.
local school district) about the educational program for that student for a fixed period of time, i.e., an academic year. After all, we allow a vast number of state and on-site educators to make decisions about appropriate curriculum, co-curricular activities and learning objectives for non-disabled students in thousands of elementary and secondary schools throughout the United States, with no direct input from students or parents.131

As noted above, professional judgment to affirm a school district’s educational program might be consciously or unconsciously influenced by limited resources, a concern for preserving collegial or contractual relationships, institutional loyalty or other conflicts.132 It is also susceptible to inherent distrust of bureaucrats by anti-government activists or by patient, parent and other grassroots advocates who are skeptical of any opinion proffered by a credentialed health or educational specialist. The influences must be mitigated in the process of selecting special masters, and monitored by stakeholders who will track administrative decisions and, more importantly, the educational outcomes. If the distrust, however, stems from a philosophical or political sentiment, it may never be assuaged.

As for the second objection, adversarial legalists may be unconvinced of the merits of this approach. For those who view the right to a FAPE in the least restrictive environment through a civil rights lens, the review scheme laid out above will not meet their expectations.133 From their perspective, this right is best protected and defended through a fair hearing before a jurist, by marshaling expert testimony and documentary evidence, and perhaps by winning some procedural arguments.134 Sometimes adversarial system adherents question whether decision makers can be fair and impartial in the collection of evidence in the inquisitorial model. The rebuttal offered is that the inquisitorial approach is not about favouring one party over the other, but collecting relevant and significant evidence.135

---

131 This is not to suggest that disabled students lack a need for additional support or that the lowest common denominator should be the governing principle in the nation’s schools. On the contrary, I have long advocated that all students deserve an individualized learning plan. See e.g. Rosenbaum, “Full Sp[Ed] Ahead”, supra note 124 at 385 (plan that “charts a course for obtaining an appropriate education” and measuring student progress), n 60 (subjected to the same parental participation and vigilance that are key to the success of every special education student).

132 See supra notes 70-73 and accompanying text.

133 Basas reminds us that the adversarial legalist mindset also “trickles down into social relations and informal resolution of conflicts…. ” Basas, supra note 20 at 45 (citing Robert A Kagan, “Adversarial Legalism and American Government” (1991) 10:3 J Pol’y Analysis & Mgmt 309.

134 Weber advances a passionate argument for the adversarial legal approach, Weber, “Due Process”, supra note 32 at 520-24, and concludes that “[l]egal remedies are always an equalizer, and are essential to maintaining a just public order.” Ibid at 524. But, he overstates both the interest at stake and the capability of a judge to best determine the interest that must be protected. I have already noted that no school administration in the country is today contesting the right of youngsters with disabilities to attend school at public expense and to receive an “appropriate” education. As it has been for years, the debate is over the “A” word. It is indeed a fundamental interest worthy of serious debate and demands attention unfettered by cost, perfunctory compliance, bureaucratic inertia or cronyism. That said, I believe the contours of what makes an education appropriate is best defined by an educator, not a lawyer or judge.

The lawyer’s objective is to obtain an order for a prospective instructional program, placement or set of services for the near term and/or compensatory education. That is much like the outcome one would expect from a special master review. The difference is in the trust invested in a judge weighing evidence with counsel’s assistance and relying on expert witness opinions, as opposed to an educator who looks over a proposed educational plan and assessments, and perhaps consults expert colleagues and asks pertinent questions of teachers, parents or even students. There are many benefits to multi-party advocacy through litigation, regulatory oversight and other forms of legal intervention. Indeed, for across-the board reform of school systems, public interest litigation is a useful tool. However, in the myriad of individual cases of parents or students who are challenging the quality or quantity of educational interventions and services, the adversarial legalist approach seems a poor substitute for a thoughtful review and consideration of best educational practices.

There may also be some self-interest at play on the part of lawyers who view this administrative procedure as inadequate or unfair. Specialty bars representing either school districts or parents and students have had their ranks swell since the enactment of the IDEA. Their desire to maintain the status quo is not necessarily about protectionism or attorneys’ fees. It may be equally driven by a professionally instilled bias that zealous advocacy based on statutory or case law is the best way to secure a government benefit—even if that benefit is not explicitly perceived as a fundamental interest or an anti-discrimination remedy.

Lastly, is the concern that there will be no incentive to have cases resolved at the administrative level; they will instead simply get “kicked upstairs” to the courts of law. Of course that same criticism could be applied to any administrative adjudicatory procedure that is viewed as pro forma, biased, incompetent or a rubber stamp for the decision-makers below—including offices of special education hearing officers and ALJs. The objection takes on a heightened meaning when the target is a review procedure that has none of the usual trappings of due process, i.e., the decision-maker is not a jurist, the model is largely inquisitorial and there may not be documentary or testamentary evidence proffered, much less a hearing.

There are, however, a few factors that can enhance the attraction of the administrative review and/or offset a race to the courthouse. First, it will be important to recruit and retain high quality reviewers. They must be viewed as knowledgeable, experienced, practical, efficient and completely independent of school districts, boards of education and parent and student advocacy NGOs. Once that reputation is established, there will be little cause for advocates or parties to

---

136 See, Hyman, Rivkin & Rosenbaum, supra note 21 at 147-50 (discussing successful impact cases on behalf of pupils with disabilities and prescriptions for future litigation).

137 The US Bureau of Immigration Appeals (BIA), for example, had suffered from a reputation as “a pit stop on the way to” federal court for judicial review, due to its routine approval of decisions by immigration judges. Rebecca Hamlin, “International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia” (2012) 37:4 Law & Soc Inquiry 933 at 944. One lawyer called the BIA “a rubber stamp” and blasted its “affirmance without opinion” practice as “a copout; we used to get real judicial review there, but now the appeals we send are just sent back within a matter of months.” Ibid (footnote omitted). Another lawyer acknowledged that “every case gets appealed [to federal court], even if it's the weakest, because we know the BIA doesn't grant anything.”

138 Jacobs & Sasha Baglay, supra note 78 at 22.
dismiss this level of review as perfunctory or a waste of time.\textsuperscript{139} Second, if the grounds for judicial review are narrow, there will not be much incentive to hold out for a more favourable decision from a court of law than one made by a school district administrator or special master.\textsuperscript{140} Finally, a renewed effort to develop informed and collaborative relationships at the IEP tables, and in facilitated or mediator-led conferences, will also limit the incentive to pursue appeals at the administrative or judicial levels.\textsuperscript{141}

\textbf{XI. CONCLUSION}

This article sets out a seven-point blueprint, sharing space with much textual (and marginal) explanation, rationale and commentary. If it is provocative for a lawyer and disability rights advocate to advance a proposal that chips away at an institution built on years of lobbying and jurisprudence—including years of magnificent successes in legislatures, courthouses and schools all across the United States—I assume that risk.

My intent is not to undo the \textit{IDEA}, but to urge a better informed and less disputatious means of resolving education disputes—by relying on forums that are more conducive to consultation and deliberation than argument and evidentiary hearings. My hope is not only for better learning outcomes for students with disabilities, but the channeling of resources into improved means of school-based collaboration, advocacy and instructional interventions.

The path to this new model has been illuminated by reviewing experiences in Canada, other Commonwealth nations, the European Union, and even the U.S., with the inquisitorial approach to decision-making and by endorsing a primary role for professionals at the decision-making table or in the conference room. The changes proposed here can only be adopted through an amendment to the \textit{IDEA}. This would involve modifying just one subsection\textsuperscript{142} of a lengthy section on procedural safeguards, from an even lengthier statute, but would greatly upset the contemporary cultural arrangements of the national special education infrastructure.

\textsuperscript{139} In contrast to the US immigration appellate process, the Canadian refugee status determination regime is characterized by “the vertical accountability and legal informality of the professional judgment model of decision-making.” Hamlin, supra note 137 at 946-47 (citing Robert Kagan, \textit{Adversarial Legalism: The American Way of Law} (London: Harvard University Press, 2001) at 10. Canadian bureaucrats who conduct these reviews “have high levels of discretion to make decisions without legislative tinkering or judicial oversight and the low level of court involvement is uncontroversial.” \textit{Ibid} at 947.

\textsuperscript{140} However, as noted above, this cannot be a sham review by the special master. There must be an adequate record for the court to consider, with findings of fact and conclusions of law—whether prepared after the fact and/or by the parties who file for an appeal. In those instances where the plaintiff asserts a liberty or property interest or another constitutional claim, the court should have more latitude to conduct a \textit{de novo} review of the facts and the law.

\textsuperscript{141} My primary concern would be to boost the credibility of the special master review—and, of course, earlier efforts at dispute resolution—in order to eliminate incentives for more costly, time-consuming (and not necessarily better informed) judicial review. A secondary benefit would be to reduce the federal court administrative appeals docket. Recent records indicate that 20\% of all federal circuit court appeals are from administrative agency decisions. Hamlin, supra note 137 at 944 (citing Administrative Office of the United States Courts, \textit{Judicial Business of the United States Courts}, 1996-2009).

\textsuperscript{142} 20 USC §1415(f) (2012).
A Congressional initiative to introduce this kind of change in the administrative review process would do well to begin with public hearings and stakeholder meetings. Perhaps some pilot projects could be initiated on a voluntary basis even before a legislative campaign is under way. The proposal would also require a dedicated effort to build up a corps of highly qualified and high integrity special masters, mainly from the ranks of educators, whose talents are already in great need in classrooms, administrators’ offices and teachers’ colleges. They are the lynchpin of this model. If they gain the genuine trust of parents and administrators, not only will they be sought for their assistance in breaking logjams that materialize on school campuses. There will also be less need to go above them to seek more favourable outcomes from judges who are much more removed from the educational arena by virtue of their position and disposition.

An essential part of my proposal is that facilitated IEP meetings, resolution conferences, mediation, non-compliance complaints and other forms of ADR be earnestly pursued by all parties. This must not become a perfunctory exercise, as it is far more efficient and effective when disputes are solved “on the ground.” Lastly, there is the thorny issue of the availability of judicial review, the standard to be applied, and the uncertain reliance on a slim record produced by the special master. Diehard adversarial legalists and other skeptics may maintain that a preponderance of the evidence, reasonableness or any other deferential standard can only be applied where a record is fully developed, with findings and conclusions made by an administrative judge.

Ultimately, the schemes for both the administrative review and judicial review must allow enough information to be put on record to make a determination about a disabled youth’s educational programming in the near-term, and to assure fairness to all parties.

---

143 The launching of pilots could coincide with efforts to establish arbitration panels or consultancies, as laid out by Rosenfeld and the AASA. There are components of these models, along with the one proposed here, that merit experimentation. In fact, the IDEA amendment itself might be to phase in the new administrative proceedings by way of pilot projects in select and willing jurisdictions of the country.