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An IDEA for Improving English Language Learners' Access to Education

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AN IDEA FOR IMPROVING ENGLISH LANGUAGE LEARNERS' ACCESS TO EDUCATION

*Erin Archerd**

ABSTRACT

English Language Learners (ELLs) and language-minority families have few promising options for receiving tailored educational services under federal law. Civil Rights era statutes like the Equal Education Opportunities Act (EEOA) designed to protect and promote ELLs' right to an education have led to few actual changes in children's education, and fewer still within reasonable time frames. For the subset of ELLs with disabilities, the Individuals with Disabilities Education Act (IDEA) holds out the promise of more direct and immediate improvements in their education. The Introduction of this Article presents the problem through a hypothetical student, Faith, and her family. Part I examines the demographics of ELLs and students with special needs in public schools in the United States. Part II discusses the EEOA's shortcomings and the promise of the IDEA's dispute resolution procedures for language-minority families. Part III examines how major metropolitan areas in California, New York, and Texas have been applying the IDEA, particularly with regard to ELLs and their families. Finally, Part IV gleans lessons from these urban districts' practices and identifies several areas of particular concern for language-minority families, advocates, and school administrators hoping to structure their special education dispute resolution programs in the most effective way.

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INTRODUCTION

Faith¹ is a seven-year-old who loves building Legos with her older brothers and baking cookies with her mom. Her family just moved to a new city in a new state, and Faith's new teacher sent home a piece of paper called a "home language survey."² Some time after returning the home language survey, Faith's parents learn that she has been placed for several hours a day in a class for students who do not speak English, and they are puzzled. Even though they do not speak English at home, Faith was not in a class for English Language Learners at her old school, although she did have a special person who helped her with what her former school called a "reading disorder." Faith does not complain about her new classes. She loves being able to speak her native language with other students in the class who also speak it, but she says the math is a lot easier than at her old school.

Faith's parents worry that this separate class is going to put her even further behind in school. After her mother makes several phone calls to the school, someone at Faith's new school answers the phone who speaks her native language. Once Faith's mother explains their concerns, the staff member tells her mother that the school will evaluate Faith for a disability. A couple of months later, Faith's parents are invited to a meeting at which they receive a written report, in English, saying that Faith is not eligible for special education services and that she will be kept in her current educational placement.³ Although someone had explained the evaluation report to them in their native language at Faith's eligibility meeting, they still don't understand why Faith cannot have a teacher to help her like she did at her prior school and why she has to be in separate classes so much of the day, missing out on more advanced math. One day, when Faith's mother vents her anger and confusion at work, a co-

1. This fictional account is a composite story meant to illustrate the kinds of difficulties the families of English Language Learners may face when interacting with schools about their children's education.

2. See *infra* Part I.A.1 for a discussion of home language surveys.

3. This eligibility meeting is held pursuant to 20 U.S.C. § 1414 (2012). Let us assume that in this scenario, a translator who speaks the native language of Faith's parents was present. Parents are supposed to receive the procedural safeguards notice "written in the native language of the parents (unless it clearly is not feasible to do so)." 20 U.S.C. § 1415(d)(2) (2012). It is not clear whether evaluation reports or IEPs must be written in parents' native language. At least one court has held that when evaluation reports are not provided to parents in their native language, then they should be provided to parents in advance of the eligibility meeting to allow for parents' "meaningful participation" at the meeting. *Baer v. Klagholz*, 771 A.2d 603, 621 (N.J. Super. Ct. App. Div. 2001).

worker tells her that he faced a similar situation with his son. He offers to help Faith's parents file a "due process claim" with the state education agency, alleging a violation of their rights under the Individuals with Disabilities Education Act (IDEA) and asking for a hearing about whether Faith qualifies for special education and related services.⁴ A few days after filing, they receive a notice to attend a "resolution meeting."⁵

Faith's parents have several options as to what legal route they might take here.⁶ If they believe that the school's programs for English Language Learners (ELLs) are inadequate, they could bring a federal lawsuit under the Equal Education Opportunities Act (EEOA) alleging that the school has failed to take appropriate action to overcome students' language barriers.⁷ Or, they could go forward with their special education due process claim and seek through that process to obtain an "individualized education program" (IEP) that adequately addresses their daughter's educational needs.⁸ Though at first glance, one might think that the EEOA provides the more promising route for Faith and her parents—after all, their main concern here is with the quality of the ELL education that Faith is currently receiving—this Article argues that for Faith and other students who may have special education needs, the IDEA provides a significantly better chance of actually improving their situation.

The IDEA is the best option because it recognizes that litigation is not the only way to resolve disputes between parents and schools. Instead, it provides for alternative dispute resolution mechanisms such as mediation and facilitated meetings, and it gives schools flexibility in how they structure these programs.⁹ These mechanisms

4. For more about due process hearings, see the discussion *infra* Part III. Parents of children with disabilities often advise each other about dealing with schools, and these informal networks can coalesce into formal organizations, such as the Parent Advocacy Coalition for Educational Rights (PACER) in Minnesota. See PACER CENTER, <http://www.pacer.org/about> (last visited Nov. 20, 2013).

5. § 1415(f)(1)(B).

6. In California, parents may request that their child be moved from a classroom for English Learners into an "English language mainstream classroom." CAL. CODE. REGS. tit. 5, § 11301 (West 2002). This would not, however, entitle Faith to special education services like a teacher's aide. See 20 U.S.C. § 1703(f) (2012). Similarly, under the federal No Child Left Behind Act (NCLB), parents have the right to request that their child be removed from placement in a language education program that receives funding under NCLB, but they do not have any particular control over what classroom instruction their child receives instead. 20 U.S.C. § 7012(a)(8)(A)(i) (2012).

7. § 1703. See *infra* Part I for a definition of an "English Language Learner."

8. For a discussion of the process of developing an IEP, see *infra* Part II.A.

9. For a discussion of some of these mechanisms, see *infra* Parts II, III.

offer the kinds of informal, expedited processes that will allow language-minority parents to improve their children's education in realistic time frames—months rather than years.

Yet there are many reasons language-minority parents might be wary of turning to the IDEA and engaging in dispute resolution directly with schools. Parents with limited or no English skills may not fully understand their options, despite the legal safeguards in place. They may be reluctant to challenge the school system directly, or they may believe that this language barrier cannot be overcome. They may fear that school officials will be biased against them or retaliate against their child, making matters even worse. Further, parents may worry that even if they succeed, their child will only face the stigma of being a special education student. These fears all exist in the shadow of the very real challenges of properly evaluating and determining services for ELLs with disabilities. Yet despite these legitimate concerns, the IDEA's dispute-resolution process is often the best hope for improving these ELL students' educations. Further, proper training and simple awareness on the part of advocates, school officials, mediators, and the programs that train them can mitigate many of these concerns. This Article aims to be part of that process.

Part I of this Article will set the stage by briefly examining two overlapping groups of students—those classified as ELLs and those in need of special education and related services—noting some salient similarities and differences and discussing the groups' respective prevalence in U.S. public schools. Part II will first discuss the key federal statutes that affect ELLs and students with disabilities, pointing out reasons why the more traditional statutes have fallen short of their initial promise. It will then argue that the IDEA, rather than the statutes more directly applicable to ELLs, offers the most promise for those ELLs who fall under its protections. Part III follows up on that thesis by examining how the IDEA works in the real world. Since ELLs are concentrated in urban schools, this Part summarizes IDEA dispute resolution practices in several large, urban districts in California, New York and Texas, with an eye toward practices aimed specifically at ELLs in special education. Finally, Part IV takes this data and offers suggestions for ways to improve the experience of language-minority families in IDEA dispute resolution, to ensure that the IDEA too does not fail this important and vulnerable group of children.

I. ENGLISH LANGUAGE LEARNERS AND SPECIAL EDUCATION

A. Definitions and Demographics

1. *English Language Learners*

Following the lead of many states, this Article will refer to children who need assistance in academic English as “English Language Learners,” or “ELLs,” to emphasize learning and progress rather than deficits and limitations.¹⁰ Many other terms are used to refer to these children. The No Child Left Behind Act (NCLB) uses the term “limited English proficient,” to refer to these students,¹¹ while the preferred term among many language researchers who promote bilingual education models is “emergent bilingual.”¹²

Under NCLB, a student is classified as limited English proficient if he or she is:

[A]n individual who is aged 3 through 21 . . . whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual . . . the ability to meet the State’s proficient level of achievement on State assessments . . . the ability to successfully achieve in classrooms where the language of instruction is English; or the opportunity to participate fully in society.¹³

The actual identification and classification of students as ELLs is left up to the states, which typically use a home language survey sent home to parents to identify whether a child is an ELL, although this is

10. “English language learner (ELL) was formerly known as ‘limited English proficient’ (LEP) and refers to students being served in appropriate programs of language assistance (e.g., English as a Second Language, High Intensity Language Training, bilingual education).” NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2012 (2012), *available at* <http://nces.ed.gov/pubs2012/2012045.pdf> (internal quotation marks omitted). California, for instance, uses the term “English Learner.” *See, e.g.*, CAL. DEP’T OF EDUC., CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST (CELDT): 2013–2014 CELDT INFORMATION GUIDE 1 (2013), *available at* <http://www.cde.ca.gov/ta/tg/el/documents/celdt13guide.pdf>.

11. 20 U.S.C. § 7801 (2012).

12. *See, e.g.*, OFELIA GARCIA, BILINGUAL EDUCATION IN THE 21ST CENTURY: A GLOBAL PERSPECTIVE 177 (2009) (“Referring to these students as English Language Learners (ELLs) as many school districts presently do, or as Limited English Proficient students (LEPs) as federal legislation such as the No Child Left Behind [A]ct does, signals the lack of recognition that in teaching these children English they will become bilingual. English Language Learners are emergent bilinguals Denying the bilingualism they develop through schooling in the United States has much to do with the unequal conditions in which these children are educated.”).

13. § 7801.

not a federal requirement.¹⁴ If students are classified as limited English proficient under NCLB, their parents must be notified within thirty days of the beginning of the school year, or two weeks after a student enrolls mid-year.¹⁵

While people often think of ELLs as “non-native speakers,” that term is often inaccurate. Contrary to common stereotype, *the majority* of ELLs are born in the United States, though they *may* grow up hearing and speaking their family’s native language at home and English outside the home.¹⁶ ELL populations vary greatly from city to city, with groups of families drawn to particular immigrant communities.¹⁷ Spanish speakers make up the vast majority of ELL

14. A U.S. Office of Civil Rights (OCR) memo from the early 1990s requires that schools “have procedures in place for identifying and assessing LEP students” but notes that “the type of program necessary to adequately identify students in need of services will vary widely depending on the demographics” such that schools “with a relatively large number of LEP students would be expected to have in place a more formal program.” Memorandum from Michael L. Williams, Assistant Secretary for Civil Rights, to OCR Senior Staff (Sept. 27, 1991), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html>. Schools often assess whether a child is an LEP student via a home language survey, which typically asks three questions: (1) whether a language other than English is spoken at home, (2) what language is most often spoken by the child, and (3) whether the child speaks a language other than English. Students whose surveys suggest a language other than English, are usually then given an English proficiency test. *See, e.g.*, CLAUDE GOLDENBERG & SARA RUTHERFORD-QUACH, *THE CIVIL RIGHTS PROJECT, THE ARIZONA HOME LANGUAGE SURVEY: THE IDENTIFICATION OF STUDENTS FOR ELL SERVICES 14* (2010), *available at* <https://people.stanford.edu/claudeg/sites/default/files/language-survey-arizona.pdf>. The one-question home language survey criticized in this study was changed back to a three-question survey in 2011 as part of a settlement with the OCR and the Department of Justice. *See* Resolution Agreement Between the Ariz. Dep’t of Educ., the U.S. Dep’t of Education’s Office for Civil Rights (Denver), and the U.S. Dep’t of Justice, Civil Rights Division, *available at* <http://www2.ed.gov/policy/gen/guid/ocr/hls-agreement.pdf>.

15. 20 U.S.C. § 7012 (2012).

16. *See* RANDY CAPPAS ET AL., *URBAN INST., THE NEW DEMOGRAPHY IN AMERICA’S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT 17–18* (2005) (noting that only 24% of elementary school and 44% of secondary school LEP students were foreign-born); CARNEGIE FOUND., *GRANTMAKERS FOR EDUCATION, INVESTING IN OUR NEXT GENERATION: A FUNDER’S GUIDE TO ADDRESSING THE EDUCATION OPPORTUNITIES AND CHALLENGES FACING ENGLISH LANGUAGE LEARNERS 1* (2010) (“[T]he majority of ELL students are U.S.-born.”); Margarita Calderón et al., *Effective Instruction for English Learners*, 21 *FUTURE CHILD* 1, 104 (2011) (“About 80 percent of second-generation immigrant children, who by definition are native-born U.S. citizens, are what schools call long-term English learners.”).

17. Columbus, Ohio, for example, is second only to Minneapolis-St. Paul in its Somali population. CMTY. RESEARCH PARTNERS, *CRP DATA BYTE NO. 2: COUNTING THE FRANKLIN COUNTY SOMALI POPULATION 1* (2009), *available at* http://www.communityresearchpartners.org/uploads/DataBytes/DataByteNo2_SomaliPopulation.pdf. Estimates of the size of this group vary widely. One source places

students, 70-80% of the population, but ELLs speak many different languages.¹⁸

While ELLs make up 10% of all public school students nationally, their populations are much higher in border states like California and Texas, as well as in large, urban cities, where they average 18% of the student population.¹⁹ The ELL population is thus highly concentrated. One report found nearly 70% of the nation's ELLs are enrolled in only 10% of its schools, which are predominately located in urban areas.²⁰

2. *Students with Disabilities*

About 13% of all public school students nationally receive special education services, and over a third of those students receive services

the ethnic Somali population in central Ohio at more than 45,000. *See* DOUG RUTLEDGE & ABDI ROBLE, *THE SOMALI DIASPORA: A JOURNEY AWAY* 95 (2008). Another source places the Franklin County, Ohio (i.e., Columbus metro area) Somali community at about 15,000 people. CMTY. RESEARCH PARTNERS, *supra*, at 1. The number of Somali speaking students in Columbus City Schools rose from 320 in 2004 to 1312 in 2007. *Id.* at 6.

18. The top five languages for ELLs in 2008 as reported by the National Clearinghouse for English Acquisition (NCELA) were: Spanish (82%), Vietnamese (2%), Chinese (1%), Hmong (1%), and Arabic (1%). NAT'L CLEARINGHOUSE FOR ENGLISH ACQUISITION, *FIVE MOST FREQUENTLY REPORTED HOME LANGUAGES OF EL STUDENTS* 3, *available at* <http://www.ncela.gwu.edu/files/uploads/24/Top5Langs08.pdf>. While Spanish is the top language of ELLs in almost every state, the next most common languages show considerable variance. *Id.* California, for instance, has large Vietnamese, Chinese and Tagalog speaking populations. Ohio has Somali and Arabic speaking populations. *Id.* New York's second most populated language category for ELLs after Spanish is "Other," a reflection of the diversity of language speakers found there (Chinese, Arabic, and Bengali are the next most common tracked languages). *Id.* at 4. Remember that 80% of ELL children are born in the United States. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 10. Regardless, undocumented children have a right to a public education in the United States. *See Plyler v. Doe*, 457 U.S. 202 (1982); MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN* (2012).

19. ELL populations tend to be relatively smaller in rural areas (6-9%) and larger in cities (11-18%). NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 10. For the 2010-11 school-year, there were an estimated 4.7 million ELL students. NAT'L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2013*, at 54 (2013) [hereinafter *CONDITION OF EDUCATION 2013*], *available at* <http://nces.ed.gov/pubs2013/2013037.pdf>. ELLs make up 10% or more of the overall public school enrollment in eight states—Alaska, California, Colorado, Hawaii, Nevada, New Mexico, and Texas. *Id.*

20. CLEMENCIA CONSENTINO DE COHEN ET AL., *URBAN INST., WHO'S LEFT BEHIND? IMMIGRANT CHILDREN IN HIGH AND LOW LEP SCHOOLS* 4-5 (2005), *available at* <http://fcd-us.org/sites/default/files/WhosLeftBehind.pdf>.

for specific learning disabilities.²¹ The IDEA defines a “[c]hild with a disability” as:

[A] child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other [sic] health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.²²

A specific learning disability is defined as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”²³

Under the IDEA and its implementing regulations, students must be evaluated by a “variety of assessment tools and strategies” to determine whether they need “special education and related services.”²⁴ Schools cannot use “any single measure or assessment as the sole criterion” for determining whether a child has a disability and the appropriate education program for that child.²⁵ Importantly, any evaluations used to determine whether a child is disabled must be “selected and administered so as not to be discriminatory on a racial or cultural basis” and must be “provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.”²⁶ Many testing instruments have special versions for ELLs.²⁷

21. NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 10, at 32. The percentage of public school children receiving special education services rose to 14% by 2004–05, and dropped to 13% by 2010–11. *Id.* In 2010–11, around 37% of children receiving services under Part B of the IDEA were classified as having a specific learning disability. *Id.*

22. 34 C.F.R. § 300.8(a)(1) (2013); *see also* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012).

23. 34 C.F.R. § 300.8(c)(10).

24. *Id.* § 300.304(b)(1).

25. § 300.304(b)(2).

26. § 300.304(c)(1); *see also* Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1032 (9th Cir. 2006) (finding no procedural violation for failure to use Korean-language assessments, when mother consented that they be in English); S.F. v. McKinney Ind. Sch. Dist., No. 4:10-CV-323, 2012 WL 718589, at *7–8 (E.D. Tex.

B. Separating Language Learning and Learning Disability

Schools often treat ELLs and students who receive special education services in similarly problematic ways. Both groups of students are often pulled out of “mainstream” classrooms and placed in segregated, restricted learning environments.²⁸ Both groups are specially tracked as subgroups under NCLB, which may lead to creative counting measures by schools when it is time to assess students.²⁹ Perhaps most troubling is the research that suggests certain groups of minority students are often disproportionately represented in more stigmatized disability classifications, such as intellectual disability (i.e., mental retardation) and emotional disturbance.³⁰

This problem of disproportionality differs based on the specific race or national origin of a student. Black students are overrepresented in categories with stigmatized connotations (like

2012) (plaintiffs awarded an independent education evaluation when original evaluation that was used was not recommended for use with deaf children); *Marple Newtown Sch. Dist. v. Rafael N.*, No. 07-0558, 2007 WL 2458076, at *7 (E.D. Pa. Aug. 23, 2007) (holding that the failure to evaluate in Spanish violated IDEA).

27. See *infra* Part B for a discussion of the importance of accurate assessment and evaluation of ELLs for special education services.

28. Federal law has little to say about this practice with respect to English Language Learners (other than that they need to be learning English) but students with special needs are supposed to be taught in the least restrictive environment possible, and the amount of time students with special needs spend “pulled out” from general classes is tracked. The trend for students with special needs has been toward more time spent in general classrooms. See, e.g., *CONDITION OF EDUCATION 2013*, *supra* note 19, fig. 2.

29. See 20 U.S.C. § 6311(b)(2)(B) (2012) (adequate yearly progress); *id.* § 6842(a)(3) (annual measurable objectives for ELLs).

30. Some researchers refer to these classifications as “judgmental” categories, since these are “usually identified by school personnel rather than a medical professional” and “school personnel making placement decisions typically exercise wide latitude in deciding who qualifies for special education through a process that is quite subjective.” Michael J. Orosco, et al., *Distinguishing Between Language Acquisition and Learning Disabilities Among English Language Learners*, in *WHY DO ENGLISH LANGUAGE LEARNERS STRUGGLE WITH READING?: DISTINGUISHING LANGUAGE ACQUISITION FROM LEARNING DISABILITIES* 5, 10 (Janette K. Klingner et al. eds., 2008) They note that these representation issues do not occur in “low incidence” categories like visual, auditory, or orthopedic impairment. *Id.*; see NAT’L RES. COUNCIL, *MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION* 35–89 (M. Suzanne Donovan & Christopher T. Cross eds., 2002) (discussing two large data sets from the Office of Special Education Programs and the Office for Civil Rights, their respective findings, and limitations of the data). For more on representation issues in special education, see BETH HARRY & JANETTE KLINGNER, *WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION?: UNDERSTANDING RACE & DISABILITY IN SCHOOLS* (2006).

mental retardation and emotional disturbance).³¹ Overrepresentation of black students in these categories may be particularly harmful, because it serves to reinforce harmful stereotypes.³² This overrepresentation can lead students to internalize the negative labels and limit the treatment and services provided by professionals.³³

On the other hand, the same research suggests that Latino students are *under*-represented in almost all disability classifications.³⁴ This effect is not universal; states with high Latino populations have special education statistics that are more reflective of the states' overall populations.³⁵ Further, although very few of the large data set studies have looked at the intersection of ELL status and disability classification, one study suggests that ELLs who attend schools in which they receive no native-language support are overrepresented in special education, particularly in programs for students with mental retardation, learning disabilities, and language and speech impairments.³⁶

Researchers are particularly concerned that ELLs will be misdiagnosed as having a specific learning disability because it can initially be difficult to distinguish language acquisition from language

31. NAT'L RES. COUNCIL, *supra* note 30, at 43–89. The National Research Council includes an “odds ratio” in which various racial/ethnic groups' chances of being diagnosed with a particular disability are weighed against white students, and a “composition index” measuring what percentage of those diagnosed with a particular disability are of each racial/ethnic group. Nationally, black students were found to be more than twice as likely as white students to be identified as having mental retardation and one and a half times more likely as having emotional disturbance. *Id.* at 57.

32. HARRY & KLINGNER, *supra* note 30, at 13.

33. *Id.*

34. NAT'L RES. COUNCIL, *supra* note 30, at 43–89. Hispanic and Asian/Pacific Islander students were less likely than white students to be identified for either category. (They were, however, slightly more likely to be identified as having a learning disability.) *Id.* at 57. However, in states with higher Hispanic populations (New Mexico, California, Arizona, and Texas), their risk of being labeled mentally retarded was found to exceed that of white students. *Id.* at 67.

35. For example, in California, Latinos made up 51.73% of all students ages 6–21 served under IDEA, Part B for 2011. OFFICE OF SPECIAL EDUCATION PROGRAMS, U.S. DEPARTMENT OF EDUCATION, OMB-1820-0043, DATA ANALYSIS SYSTEM (DANS): CHILDREN WITH DISABILITIES RECEIVING SPECIAL EDUCATION UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2011), (original data on file with author) (data updated as of July 15, 2012).

36. ALFREDO J. ANTILES & ALBA A. ORTIZ, ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS 8–9 (Alfredo J. Antiles & Alba A. Ortiz eds., 2002) (“[O]verrepresentation in special education appears to be associated with the size of the English language learner population in school districts and the availability of language support programs.”).

disorder.³⁷ Although some advocates might welcome such a development as an opportunity to argue for greater services for that student, this Article does not go quite so far. Instead, it looks at the children who fall within the overlapping groups of ELLs and students with special needs, and argues that for these children, at least, the IDEA offers opportunities to receive a targeted, appropriate education that may not be available under ELL-specific laws.³⁸ In order to harness the power of the IDEA, however, parents and advocates need to be savvy about the kinds of procedures available for designing programs for students with special needs. In particular, this Article argues that the growing popularity of dispute resolution mechanisms like mediation and facilitation merits particular attention for language-minority families, but participants (be they parents, schools, or dispute resolution providers) need to be ready to address the cultural issues that may arise.

II. THE PROMISE OF THE IDEA

The IDEA, by creating an IEP for each student, provides a unique set of opportunities for students with special education needs. While ELLs do receive attention, and theoretically access to some services, under federal statutes like the EEOA and NCLB, none offer the legal protections and recourse that eligible ELLs will receive under the IDEA. Resolution techniques like mediation have come to play a key role in solving IDEA disputes, and parents of ELLs can and should understand and take advantage of IDEA dispute resolution in working out appropriate educational programming for their children.

37. Michael J. Orosco et al., *Distinguishing Between Language Acquisition and Learning Disabilities Among English Language Learners*, in WHY DO ENGLISH LANGUAGE LEARNERS STRUGGLE WITH READING: DISTINGUISHING LANGUAGE ACQUISITION FROM LEARNING DISABILITIES, *supra* note 30, at 14 (“The characteristics of [a Learning Disability] and second language acquisition can appear quite similar. For this reason, practitioners have assessed and diagnosed many ELLs as having LD when they may not have actually had disabilities.”).

38. Research suggests that up to 9% of ELLs are receiving special education services. JANE MINNEMA ET AL., NAT’L CTR. FOR EDUC. OUTCOMES, ENGLISH LANGUAGE LEARNERS WITH DISABILITIES AND LARGE-SCALE ASSESSMENTS: WHAT THE LITERATURE CAN TELL US 6 (2005), *available at* <http://files.eric.ed.gov/fulltext/ED486232.pdf>. This suggests that, overall, ELLs are underrepresented in special education. *Id.*

A. The IDEA Provides a Unique Framework Among Federal Education Laws

The intersection of ELLs and children with special education needs is a murky place to begin any analysis. Schools treat the two groups similarly in many ways—in particular, by separating them from other students and tracking them separately under NCLB³⁹—yet each group has unique educational needs that must be addressed differently.⁴⁰

Students with special education needs and ELLs also fall under widely divergent legal frameworks. Special education students benefit from the IDEA,⁴¹ a statute that lays out many individual rights for students with special education needs. The IDEA provides to each student with a disability the right to a “free appropriate public education”⁴² in the “least restrictive environment.”⁴³ This provision is a particularized determination, responsive to the needs of the student in question, rather than looking to whether the school’s overall special education programs are adequate.⁴⁴

Schools go through a number of steps to identify and address special education needs. First, parents, teachers, or school staff who suspect a student may have a disability will request a student evaluation.⁴⁵ Next, the school evaluates the student.⁴⁶ Parents may also take their children for an “independent education evaluation.”⁴⁷ Based on the evaluation, the school then determines whether the

39. 20 U.S.C. § 6301 (2012).

40. One of the most salient areas of difference is in the means of assessment, discussed *infra* Part III.

41. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012).

42. A “free appropriate public education” is the special education and related services that “(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include the appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program” required under the IDEA. 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17 (2013).

43. Commonly known as “LRE.” 20 U.S.C. § 1411(e)(3)(F)(i); 34 C.F.R. § 300.114 (2013).

44. A free appropriate public education is based on meeting each child’s own IEP. 34 CFR § 300.101 (2013); *see, e.g.*, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188–89 (1982) (holding that services must “comport with the child’s IEP”).

45. This is referred to as the “child find” step. 20 U.S.C. § 1412(a)(3).

46. 20 U.S.C. § 1414(a).

47. 34 C.F.R. § 300.502 (2013). Parents usually have to pay for an independent evaluation out of pocket, and try to seek reimbursement later, if at all. This makes such evaluations cost-prohibitive for many families.

student is eligible for services.⁴⁸ If the student is deemed eligible, the school then creates an IEP tailored specifically to his or her needs.⁴⁹ In creating the IEP, parents, teachers, and school staff—and sometimes the student—meet to review the student’s evaluations and assessments and determine a schooling plan which identifies measurable annual goals and describes how those goals will be supported and assessed for the next year.⁵⁰ Notably, the IEP must consider the student’s language needs.⁵¹

If parents and schools disagree about a student’s eligibility or the special education services to which he or she is entitled, the parents have two main options. They can file a complaint with the state, in which case the state educational agency must investigate and determine whether the complaint has any merit.⁵² Alternatively, they can file a federal due process complaint.⁵³ Because this Article is primarily focused on the dispute resolution procedures that accompany a due process complaint, it does not discuss state complaint procedures at length. However, it is worthwhile to understand some of the procedural differences between due process and state complaints. Only parents or public agencies can file due process complaints, and then only to seek relief for a specific student regarding identification, evaluation, placement or provision of a “free appropriate public education.”⁵⁴ State complaints tend to focus on systemic violations of special education laws.⁵⁵ Anybody can file a state complaint with the state’s education agency alleging that a public agency has violated Part B of the IDEA.⁵⁶ The state then investigates the complaint and issues a written determination about the allegations, which may include an order to a district to provide

48. 20 U.S.C. § 1414(b)(4).

49. § 1414(d).

50. *Id.*

51. 34 C.F.R. § 300.324(a)(2)(ii) (2013).

52. 34 C.F.R. §§ 300.151–300.153 (2013).

53. For an outline of the state complaint process, see Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2008). Parents can file both a state complaint and a due process complaint concurrently, but the issues that are subject to the due process complaint are set aside pending the hearing officer’s due process decision. § 300.152(c)(1). States must provide parents who file state complaints the (voluntary) opportunity to mediate the dispute. § 300.152(a)(3)(ii).

54. 34 C.F.R. § 300.507(a) (2013).

55. See, e.g., Monica Costello, Note, *Systemic Compliance Complaints: Making IDEA’s Enforcement Provisions a Reality*, 41 U. MICH. J. L. REFORM 507, 511 (2008).

56. § 300.153.

appropriate services or change policies and procedures.⁵⁷ State complaints have the advantages of the state paying for the investigation and the potential that the state will order relief not just for one child but for all children subject to an alleged practice.⁵⁸ On the other hand, state complaints are less likely to order specific relief for a particular child, and the decisions cannot usually be appealed.⁵⁹

This basic enforcement structure has been in place since the IDEA was first enacted in 1975.⁶⁰ What really makes the IDEA useful for language-minorities is the set of conflict resolution procedures first introduced in 1997 and expanded with the 2004 reauthorization of the IDEA.⁶¹ But to fully appreciate the benefits of these procedures, one should first understand why the other potential vehicles for improving ELL children's education fall short. This Article addresses those options next, before returning to the IDEA in Part II.C.

B. The EEOA and NCLB Fall Short at Improving ELL Education

While the IDEA calls for individuality and specificity in the education of a child with special needs,⁶² the federal statute that deals most directly with ELLs is much less tailored to the needs of individual students. The EEOA provides that “[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the *failure by an educational agency to take appropriate action to overcome language barriers* that impede equal participation by its students in its instructional programs.”⁶³ Congress passed the EEOA in 1974, shortly after the Supreme Court decided *Lau v. Nichols*,⁶⁴ which

57. §§ 300.151–300.153; *id.* § 300.220(c)(3).

58. § 300.151(b)(2).

59. OSEP regulations leave it to the states whether or not the state's written decision on a state complaint can be appealed. Zirkel, *supra* note 53, at 569.

60. The IDEA began life as the Education for All Handicapped Children Act (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (1975). For a history of the Act, see RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 27-43* (2012).

61. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37.

62. *See supra* Section III.A.

63. 20 U.S.C. § 1703 (2012) (emphasis added).

64. 414 U.S. 563 (1974). While the petitioners did not specifically request English instruction (instruction might have been provided in Chinese), Justice Douglas, writing for the court, noted that proficiency in English was required for a California high school diploma and said, “students who do not understand English are effectively foreclosed from any meaningful education.” *Id.* at 566. Justice Stewart,

found that the San Francisco Unified School District's failure to teach English to non-English speaking Chinese students violated Section 601 of the Civil Rights Act of 1964.⁶⁵ Under the EEOA, parents do have the right to sue school districts in federal court.⁶⁶ The statute's mandate, however, looks to the school's overall efforts to overcome language barriers; it does little to provide individual students with any specific educational rights, and as courts have interpreted the statute, schools have broad leeway in what sort of educational services they provide to ELLs.

The Fifth Circuit has articulated the standard by which school programs for ELLs are now judged: first, a school's program must be "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy."⁶⁷ Second, the program must be "reasonably calculated to implement effectively the educational theory adopted by the school."⁶⁸ Third, the program must "produce results indicating that

Chief Justice Burger, and Justice Blackmun joined in a concurring opinion arguing that San Francisco's actions were not obviously a violation of the Civil Rights Act itself, but certainly went against the interpretive guidelines that "require affirmative efforts to give special attention to linguistically deprived children." *Id.* at 571.

65. 42 U.S.C. § 2000d (2012) (Title VI).

66. Both individuals and the U.S. Attorney General may bring a civil action for denial of equal educational opportunity. 20 U.S.C. § 1706 (2012).

67. *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981). In *Castaneda*, a group of Mexican-American students and their families brought suit against the Raymondville, Texas Independent School District (RISD) under the Fourteenth Amendment, Title VI of the Civil Rights Act, and the EEOA, with the claims about inadequate language education services brought under Title VI and the EEOA. *Id.* at 992. The parents argued RISD was not complying with the guidelines set forth by the Department of Health, Education, and Welfare after the 1974 decision in *Lau*. *Id.* at 1006. The Fifth Circuit held that Title VI violations required intent to discriminate, not merely differential impact, and so the parents failed on their Title VI claim. *Id.* at 1007. The Fifth Circuit struggled with how to analyze the differences between Title VI and Section 1703(f) of the EEOA:

We think Congress' use of the less specific term, 'appropriate action,' rather than 'biligual [sic] education,' indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in [section] 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Id. at 1009.

68. *Id.* at 1010.

the language barriers confronting students are actually being overcome.”⁶⁹ A number of other courts have adopted this test, and the Supreme Court has declined to reject it despite more than one opportunity to do so.⁷⁰ Courts have interpreted the first prong—sound educational theory—very favorably toward schools, and some legal and educational scholars now argue that students’ best chance for a successful EEOA challenge lies in gathering evidence that programs are failing under the third prong—actually overcoming language barriers.⁷¹

69. *Id.* Ultimately, the Fifth Circuit found that RISD satisfied the first prong of the test, but remanded the case to the District Court to examine and decide the second and third prongs. *Id.* at 1014.

70. *See, e.g.,* *Horne v. Flores*, 557 U.S. 433, 439 (2009) (finding that the lower court had misinterpreted appropriate action under the EEOA); *United States v. Texas*, 601 F.3d 354, 365–66 (5th Cir. 2010) (citing *Castaneda* and *Horne*); *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (using *Castaneda* as “the proper initial direction for inquiry” into potential EEOA violations); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017 (N.D. Cal. 1998) (using *Castaneda*’s “framework to guide the analysis” of whether a language program proscribed by California’s Proposition 227 violated § 1703(f) of the EEOA); *Teresa P. ex rel. T.P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 712 (N.D. Cal. 1989) (noting that the Ninth Circuit had not adopted a framework for appropriate action under the EEOA and using the *Castaneda* analysis). Interestingly, the Seventh Circuit in *Gomez* and the Northern District of California in *Teresa P.* both noted that *Castaneda* needed “fine tuning.” *Gomez*, 811 F.2d at 1041 (“[T]he *Castaneda* decision provides a fruitful starting point for our analysis. The fine tuning must await future cases.”); *Teresa P.*, 724 F. Supp. at 713 (noting that “the *Castaneda* guidelines require fine tuning, but nevertheless provide a helpful analytic structure”). The Supreme Court did nothing, however, to refine the *Castaneda* framework in the Court’s 2009 decision in *Horne v. Flores*.

71. *See* Eric Hass & Mileidis Gort, *Demanding More: Legal Standards and Best Practices for English Language Learners*, 32 BILINGUAL RES. J. 115, 117 (2009). One reason that the first prong has been interpreted so leniently is the diversity of available programs for ELLs. These include programs like two-way immersion, developmental bilingualism, transitional bilingualism, English as a second language (ESL), structured English immersion, and sheltered instruction. Each program type varies in dimension such as the language of instruction, cultural goals (e.g., some emphasis on retaining appreciation of the ELL’s home culture in addition to integrating into mainstream American culture), and length of time students participate in the program (e.g., one year goal for structured English immersion to up to the entire elementary and secondary school career for two-way immersion). *See generally* EDUCATING ENGLISH LANGUAGE LEARNERS: A SYNTHESIS OF RESEARCH EVIDENCE (Fred Genesee et al. eds., 2006); SYNTHESIZING RESEARCH ON LANGUAGE LEARNING AND TEACHING (John M. Norris & Lourdes Ortega eds., 2006). California alone has five different types of instructional programs available for ELLs: English Language Development (ELD) taught in English appropriate to student’s level of English; ELD and Specially Designed Academic Instruction in English (SDAIE), in which at least two academic subjects are also taught in English appropriate to the student’s comprehension level; ELD and SDAIE with Primary Language Support, in which at least two academic subjects are taught in the student’s primary language;

But even where challengers can meet this stringent test, a federal lawsuit under the EEOA is not likely to produce improvements quickly enough to make a difference in the life of the students on whose behalf the suit is brought. *Horne v. Flores* illustrates this difficulty.⁷² In 1992, a group of parents in Nogales, Arizona, including Miriam Flores, sued the Arizona Board of Education and the Superintendent of Schools for violations of the EEOA.⁷³ After eight years of failed negotiation and, ultimately, litigation, the district court issued a verdict in 2000; Arizona was ordered to conduct a study of potential ELL programs.⁷⁴ But Arizona did not complete the study in a timely manner, and in 2005 the parents went back to court to enforce the order.⁷⁵ The court then imposed sanctions on the state's legislature, eventually increasing the fines to \$2,000,000 per day of noncompliance.⁷⁶ After a series of political disputes, members of the state legislature intervened in the case and asked the court to vacate the order due to changed circumstances.⁷⁷ The court denied relief, which the Ninth Circuit affirmed, and the United States Supreme Court granted certiorari on the issue.⁷⁸ By a vote of 5-4, the Court reversed and remanded, instructing the lower courts to investigate the possibility of changed circumstances more deeply.⁷⁹ In March 2013, more than 20 years after the EEOA suit was originally filed, the district court ruled for the State, finding Arizona's current ELL programs compliant with federal law.⁸⁰ The plaintiffs have appealed

and Other Instructional Settings. See GUADALUPE VALDÉS ET AL., *LATINO CHILDREN LEARNING ENGLISH: STEPS IN THE JOURNEY 4* (2011).

72. 557 U.S. 433 (1992).

73. *Id.* at 438.

74. *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1114 (D. Ariz. 2005). The District Court found that "the method used by the State for funding ELL programs bore no rational relationship to the actual cost of providing such programs and was inadequately funded in an arbitrary and capricious manner that was violative of the Equal Education Opportunity Act." *Id.*

75. *Id.*

76. *Id.* at 1120–21.

77. See *Horne v. Flores*, 557 U.S. 433, 442–43 (2009).

78. *Id.*

79. Justice Alito, writing for the Court, called for the lower court to consider "at least four important factual and legal changes that may warrant the granting of relief from the judgment: the State's adoption of a new ELL instructional methodology, Congress' enactment of NCLB, structural and management reforms in Nogales, and increased overall education funding." *Id.* at 459.

80. Judge Raner Collins noted in his decision that "[t]he Supreme Court made clear that the State has tremendous discretion and flexibility to design programs that meet local needs." *Flores v. Arizona*, No. CIV 92-596-TUC-RCC, slip op. at 19 (D. Ariz. Mar. 29, 2013). One gets the impression that the court was rather disappointed in coming to the holding it did, noting that "[m]ost of the credit for the success that

this ruling, with the support of the Department of Justice Civil Rights Division.⁸¹

As an alternative to direct litigation, parents and advocacy groups can attempt to invoke state and federal agency oversight and enforcement powers. The Civil Rights Act provides ELLs with some leverage, because the Department of Education Office for Civil Rights specifically enforces Title VI.⁸² Similarly, parents can file EEOA complaints with the Education Opportunities Section of the Department of Justice Civil Rights Division.⁸³ Although both options will require schools (at least those with large ELL populations) to have *some* educational services in place to teach ELLs academic

the Nogales school district has experienced is due to the actions taken by the district itself, and not those taken by the state.” *Id.* at 22. It concluded,

It appears that the state has made a choice in how it wants to spend funds on teaching students the English language. It may turn out to be penny wise and pound foolish, as at the end of the day, speaking English, and not having other educational gains in science, math, etc. will still leave some children behind. However, this lawsuit is no longer the vehicle to pursue the myriad of educational issues in this state.

Id. at 22–23.

On a more positive note for at least one plaintiff, Miriam Flores, the daughter of plaintiff Miriam Flores, went on to the University of Arizona. Mary Ann Zehr, *Who are Miriam Flores and Miriam Flores*, EDUC. WK.: LEARNING LANGUAGE BLOG (Apr. 7, 2009), http://blogs.edweek.org/edweek/learning-the-language/2009/04/who_are_miriam_flores_and_miri.html.

81. Brief for the United States, *Flores v. Huppenthal*, No. 13-15805 (9th Cir. Sept. 13, 2013); Brief of Plaintiffs-Appellants, *Flores v. Arizona*, No. 13-15805 (9th Cir. Sept. 5, 2013).

82. Individuals may lodge complaints with OCR, or OCR may independently review for compliance. See *Welcome to the OCR Complaint Assessment System*, OFFICE FOR CIVIL RIGHTS COMPLAINT ASSESSMENT SYSTEM, <https://wdcrocolp01.ed.gov/CFAPPS/OCR/complaintform.cfm> (last visited Dec. 18, 2013). OCR has effectively adopted the *Castaneda* standard to determine whether a school’s program for ELLs complies with Title VI. OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., POLICY UPDATE ON SCHOOLS’ OBLIGATIONS TOWARD NATIONAL ORIGIN MINORITY STUDENTS WITH LIMITED-ENGLISH PROFICIENCY (1991), available at <http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html>. The Office also acknowledges the importance of determining whether schools “have policies of no ‘double services’: that is, refusing to provide both alternative language services and Special education to students who need them.” *Id.* Also noteworthy is that the OCR considers it a Title VI violation to misidentify a student as having a disability because of their inability to speak and understand English. See OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., THE PROVISION OF AN EQUAL EDUCATION OPPORTUNITY TO LIMITED-ENGLISH PROFICIENT STUDENTS (2000), available at <http://www2.ed.gov/about/offices/list/ocr/eeolep/index.html> (laying out OCR’s approach to limited English proficient students).

83. Complaint forms are available in English, Spanish, Chinese, Korean, and Vietnamese. *Filing a Complaint*, U.S. DEP’T OF JUSTICE, available at <http://www.justice.gov/crt/about/cor/complaint.php> (last visited Dec. 18, 2013).

English, the courts are likely to defer to schools as to the nature of those services. These options therefore suffer from many of the same problems as direct litigation.

The best known, and perhaps most criticized, federal education statute is NCLB, which makes extensive use of testing and benchmarking to track the progress of students in US public schools.⁸⁴ Under NCLB, schools track both language-minority students⁸⁵ and students with special needs.⁸⁶ Title III of the statute says that states must “ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet.”⁸⁷ But despite this high-minded language, neither the statute itself nor the implementing regulations provide much guidance in terms of what sort of educational services should be provided to ELLs.⁸⁸ Indeed,

84. See 20 U.S.C. § 6301 (2012). Under No Child Left Behind, schools receiving federal funds must measure whether students are making “adequate yearly progress” (AYP) in certain academic areas. *Id.* § 6311(b)(2)(C). Schools measure this through regular testing of students and face sanctions if a certain percentage of students do not meet a minimum level of proficiency, including the complete restructuring of a school. *Id.* § 6316. Much ink has been spilled on the benefits and demerits of No Child Left Behind. See, e.g., Damon T. Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill Brown’s Promise*, 30 YALE L. & POL’Y REV. 169, 169–77 (2011) (critiquing NCLB on a number of dimensions, including its failure to provide access to better performing schools when a student’s school is restructured); Diana Pullin, *Getting to the Core: Rewriting the No Child Left Behind Act for the 21st Century*, 39 RUTGERS L. REC. 1 (2010) (focusing on improvements to NCLB for students with disabilities); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) (arguing the law should be revised to focus on improving performance by measuring growing achievement rates, but avoid using absolute achievement targets; and pointing out the potential for schools to segregate groups of students to improve AYP); Regina R. Upstead & Elizabeth Kirby, *Reauthorization Revisited: Framing the Recommendations for the Elementary and Secondary Education Act’s Reauthorization in Light of No Child Left Behind Implementation Challenges*, 276 ED. LAW. REP. 1 (2012) (examining the controversies and implementation difficulties of NCLB).

85. § 6311(b)(2)(C)(v)(dd).

86. § 6311(b)(2)(C)(v)(cc).

87. *Id.* § 6812(1). Title III was formally called the “English Language Acquisition, Language Enhancement, and Academic Achievement Act.” It is a descendant of the “Bilingual Education Act,” first enacted as Title VII of the Elementary and Secondary Education Act (ESEA) of 1968, NCLB’s predecessor. By incorporating that statute into Title III, NCLB expressly declines to endorse any particular language education method, such as bilingual education.

88. See, e.g., Eden Davis, *Unhappy Parents of Limited English Proficiency Students: What Can They Really Do?*, 35 J. L. & EDUC. 277, 279 (2006).

parents have no individual right of action under NCLB, and so to enforce it they must enlist public bodies like the DOJ and DOE.⁸⁹ Finally, NCLB exists in a cloud of uncertainty because the Obama Administration has eased enforcement of its provisions, granting the majority of the states NCLB waivers and instead promoting programs like Race to the Top, further limiting the Act's effectiveness as a tool for improving a particular ELL student's educational options.⁹⁰

C. Maybe Lawsuits Are Not the Answer: How the IDEA Can Help

1. *The IDEA's Dispute Resolution Procedures*

With this background, this Article now turns back to the IDEA. Like the EEOA, the IDEA allows for federal and state lawsuits.⁹¹ But the IDEA also requires parents to exhaust a number of administrative procedures before going to the courts, including a due process hearing, and a mandatory, but waivable, pre-due-process

89. *See* *Horne v. Flores*, 557 U.S. 433, 455 n.6 (2009) ("As the Court of Appeals itself recognized, NCLB does not provide a private right of action."). In *Newark Parents Ass'n v. Newark Public Schools*, the Third Circuit concluded that Congress did not intend to create individual enforcement rights. 547 F.3d 199, 214 (3d Cir. 2008). The opinion also noted that while it was the first federal court of appeals to find no private right of action, every district court that had decided the matter found no private right of action for parents. *Id.* at 212.

90. "Race to the Top" was a competitive grant program awarding chosen states money for initiatives that fell within areas determined by the DOE. *Race to the Top Fund*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/programs/racetothetop/index.html> (last visited Dec. 18, 2013). Race to the Top does not necessarily weaken the enforcement of any particular provision of NCLB. Indeed, some states may make improving ELL education a part of their Race to the Top grant applications. As of 2011, the U.S. Department of Education had invited states to request "ESEA Flexibility" on NCLB requirements, in exchange for "rigorous and comprehensive State-developed plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction." *See ESEA Flexibility*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last visited Dec. 18, 2013). Currently, forty-five states have requested waivers and forty-one states have received them. *Id.* A group of eight California school districts, including San Francisco and Los Angeles Unified School Districts, going by the name of CORE (California Office to Reform Education) were recently granted their own NCLB waiver. *See* Press Release, U.S. Dep't of Educ., Obama Administration Approves NCLB Waiver Request for California CORE Districts (Aug. 6, 2013), *available at* <http://www.ed.gov/news/press-releases/obama-administration-approves-nclb-waiver-request-california-core-districts>. The press release highlights these districts' emphasis on higher standards for students "particularly English Learners, students with disabilities, and low-achieving students" and gives estimates of 20,000 English Learners and 46,000 students with disabilities within the CORE districts. *Id.*

91. 20 U.S.C. § 1415(i)(2) (2012).

hearing meeting called a resolution session.⁹² Pre-due-process hearing procedures began as voluntary efforts, as states in the 1980s and 1990s began to adopt mediation as part of their special education dispute resolution methods.⁹³ Sixteen years ago, in 1997, Congress began formalizing these procedures, adding a requirement that states offer mediation upon the filing of a due process complaint.⁹⁴ The 2004 reauthorization of the IDEA went further, mandating that states provide a series of pre-due-process hearing dispute resolution procedures.⁹⁵ Moreover, states are now required to offer mediation to resolve any IDEA-related disputes both before and after filing a due process complaint.⁹⁶

Under the current statutory regime, the process runs roughly as follows: even before the parent files a due process complaint, she has the option of mediating her dispute with the school.⁹⁷ After she files the complaint, she again can voluntarily choose to mediate the dispute.⁹⁸ This mediation must take place promptly, within thirty days of filing.⁹⁹ Alternately, upon filing a due process complaint, she must agree to engage in a “resolution session” with school officials in an even shorter timeframe, no more than fifteen days after filing, unless the parent and school agree to waive the resolution session and either mediate or go straight to the due process hearing.¹⁰⁰ Only after these dispute resolution options have been exhausted (or waived) does the

92. Depending on the jurisdiction, there may be exceptions to the exhaustion requirements, but generally IDEA claims must first be decided by a hearing officer in a due process hearing. See Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349, 356–60 (2009). The popularity of, but also the confusion surrounding, the IDEA's dispute resolution procedures are reflected in a voluminous OSEP memorandum released in July 2013. Memorandum from Melody Musgrove, Dir., Office of Special Educ. Programs, to Chief State Sch. Officers, State Dirs. of Special Educ. (July 23, 2013) [hereinafter OSEP Memo 13-08].

93. See OSEP MEMO 13-08, *supra* note 92, Question A-2.

94. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37. The new mediation procedures were found in section 615(e).

95. The statute sought to expand the use of dispute resolution procedures nationwide, providing, “Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.” 20 U.S.C. § 1400(c)(8) (2012).

96. § 1415(e)(1).

97. *Id.*

98. *Id.*

99. § 1415(f)(B)(ii) (requiring that if the educational agency has not resolved the complaint within thirty days of the complaint, the due process hearing may occur).

100. § 1415(f)(B)(i)(I).

due process complaint go to a hearing officer for decision, and only after that may the parent take the dispute to federal court.¹⁰¹ For the due process hearings, some states have one-tier systems, where a due process complaint is only adjudicated by a hearing officer, while others have a two-tier system where there is an additional level of review by a second officer before the claim can be brought in federal court.¹⁰² Many states and individual school districts have developed other forms of dispute resolution, particularly with a focus on pre-due-process complaint filing, commonly called “upstream” solutions.¹⁰³ Some of these will be seen in the discussion of specific district practices in Part III below.

A brief introduction to mediation may help the reader understand the differences between these options. The simplest definition of mediation is “negotiation carried out with the assistance of a third party (in other words, a nonparty to the negotiation).”¹⁰⁴ There are many different perspectives as to how this third party should go about assisting in a dispute.¹⁰⁵ Traditional analyses place mediator styles along a continuum from “facilitative,” with a greater emphasis on helping the parties to develop and choose among possible solutions to a dispute, to “evaluative,” with more emphasis on the mediator

101. However, these dispute resolution procedures cannot be used to delay a parent’s right to a due process hearing. § 1415(e)(2)(A)(ii).

102. See § 1415(f)–(g); 34 C.F.R. § 300.514 (2013). For an overview of how hearing officers are utilized throughout the country, see Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1, 3 & n.7 (2011).

103. The Center for Appropriate Dispute Resolution (CADRE)—a center funded by OSEP—has created a continuum model in which it arranges interventions from prevention (e.g., parent engagement) to legal review (e.g., litigation). See *CADRE Continuum of Dispute Resolution Processes & Practices*, CADRE <http://www.directionservice.org/cadre/continuumnav.cfm> (last visited Dec. 18, 2013). In the middle are processes like parent-to-parent assistance and use of an ombudsperson. *Id.* This Article focuses on dispute resolution procedures that fall under the meeting and/or meeting-plus-third-party-neutral framework, as these are still the only federally mandated methods of resolving special education disputes, and because the role of neutrals is the key focus of this Article. However, many of the concerns raised about neutrals as facilitators or mediators, would also apply to a neutral in an ombudsperson role.

104. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 121 (6th ed. 2012).

105. For a thorough overview of mediation values and philosophical approaches, see Ellen Waldman, *Values, Models and Codes*, in *MEDIATION ETHICS: CASES AND COMMENTARIES* 1, 1–26 (2011). For a discussion of mediation styles in the context of special education mediation, see Grace D’Alo, *Accountability in Special Education Mediation: Many a Slip ‘Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 205 (2003).

weighing the arguments of the parties.¹⁰⁶ The U.S. Department of Education, Office of Special Education Programs (OSEP), in recent regulatory guidance about IDEA Part B dispute resolution, gives this definition:

Mediation is an impartial and voluntary process that brings together parties that have a dispute concerning any matter arising under 34 CFR part 300 (the Part B of the IDEA (Part B) regulations) to have confidential discussions with a qualified and impartial individual. The goal of mediation is for the parties to resolve the dispute and execute a legally binding written agreement reflecting that resolution. Mediation may not be used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B. 34 CFR §300.506(b)(1) and (8).¹⁰⁷

106. See JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 107–48 (2d ed. 2006). The facilitative/evaluative style descriptions were popularized by Leonard Riskin, who has described mediator orientations as a grid with two axes. The vertical axis looks at mediator behavior from facilitative to evaluative, while the horizontal axis looks at way the mediator is defining the problem, from narrow (how much money should X pay to Y) to broad (how to improve conditions in a community or industry). Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996). OSEP guidance suggests that it assumes IDEA mediators use a more facilitative approach, stating that “the mediator acts as a facilitator and does not pass judgment on specific issues . . . the hearing officer is required to render a final decision that contains findings of fact and decisions that would generally include specific remedies.” OSEP Memo 13-08, *supra* note 92, Question A-9. The third prominent mediation style is transformative mediation, which emphasizes empowering the parties through the mediation process. See generally ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2005).

107. OSEP Memo 13-08, *supra* note 92, Question A-1. For IDEA purposes, “qualified” means trained in effective mediation techniques and knowledgeable in laws and regulations relating to the provision of special education and related services. 34 C.F.R. § 300.506(b)(1)(iii), b(3)(i) (2013). Each state establishes its own training and qualifications for special education mediators, often through a state's department of education, and federal guidance to states is silent as to specific mediator qualifications. See, e.g., OSEP Memo 13-08, *supra* note 92. In California, for instance, special education due process is coordinated by the Office of Administrative Hearings (OAH), which is separate from the California Department of Education. See CAL. OFFICE OF ADMIN. HEARINGS, FREQUENTLY ASKED QUESTIONS SPECIAL EDUCATION DUE PROCESS HEARINGS AND MEDIATIONS 7 (2008), available at <http://www.documents.dgs.ca.gov/oah/SE/Forms/OAH%2070,%20rev.%2007-08.pdf>. The pool of mediators includes many of the administrative law judges (ALJs) who perform the special education due process hearings. *Id.* California's Office of Administrative Hearings clarifies that the same ALJ will not be assigned to a mediation and due process hearing on the same case. *Id.* In Texas, “[m]ost of the contract mediators are also special education due process hearing officers.” DIV. OF LEGAL SERVS., TEX. EDUC. AGENCY, SPECIAL EDUCATION RESOLUTION SYSTEMS HANDBOOK 8 (2013).

As noted above, special education mediation is confidential under the IDEA—and often under state laws as well.¹⁰⁸ The IDEA and its regulations are silent as to whether states can limit attorney participation in special education mediations, and, at least in the past, some states have chosen to do so.¹⁰⁹

108. 20 U.S.C. § 1415(e)(2)(G) (2012); 34 C.F.R. § 300.506(b)(8). For a state-by-state review of mediation laws, see SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* (2d ed. 2010). Many states have adopted versions of Uniform Mediation Act (UMA), which deals primarily with confidentiality and privilege in mediation communications. See *Mediation Act Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> (last visited Dec. 18, 2012). The UMA has been adopted by the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington, and has been introduced in New York and Massachusetts. See *Acts: Mediation Act*, UNIFORM L. COMMISSION, available at <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> (last visited Dec. 18, 2012). Delaware, Florida, Montana, Nevada, Oregon, Virginia, and Wyoming have adopted similar bills. See Matt Brown, *Legislation: Where the Uniform Mediation Act Stands in the States*, CPR, <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/239/Legislation-Where-the-Uniform-Mediation-Act-Stands-in-the-States-Web.aspx> (last visited Dec. 18, 2013).

109. See EDWARD FEINBERG & JONATHAN BEYER, *THE ROLE OF ATTORNEYS IN SPECIAL EDUCATION MEDIATION* 8 (2000), available at <http://www.directionservice.org/cadre/pdf/The%20Role%20of%20Attorneys%20in%20Special%20Education%20Mediation.pdf> (reporting that at least seven states—Alaska, Arkansas, Delaware, Idaho, Maine, New Hampshire, Pennsylvania, and Washington—“formally exclude or discourage attorneys from participating in mediation.”). The current Notice of Procedural Safeguards for most of these seven states do not appear to actively discourage or exclude attorneys. See ALASKA DEP’T OF EDUC. & EARLY DEV., *NOTICE OF PROCEDURAL SAFEGUARDS: PARENTAL RIGHTS FOR SPECIAL EDUCATION* (2012), available at <http://education.alaska.gov/TLS/SPED/pdf/FY%2013%20General%20Updates/ProSafe.pdf>; ARK. DEP’T OF EDUC., *PART B PROCEDURAL SAFEGUARDS NOTICE* (2013), available at https://arksped.k12.ar.us/documents/grantsanddata/Procedural_Safeguards_Notice.pdf; DEL. DEP’T OF EDUC. EXCEPTIONAL CHILDREN RESOURCES, *SPECIAL EDUCATION RIGHTS OF PARENTS AND CHILDREN* (2012), available at http://www.doe.k12.de.us/infosuites/students_family/specialed/files/ProceduralSafeguards.Revised5.1.2012.pdf.Revised5.1.2012.pdf (“Delaware Safeguards Notice”); IDAHO STATE DEP’T OF EDUC., *PART B PROCEDURAL SAFEGUARDS NOTICE* (2008), available at www.sde.idaho.gov/site/special_ed/forms.htm; N.H. STATE DEP’T OF EDUC., *SPECIAL EDUCATION PROCEDURAL SAFEGUARDS HANDBOOK* (2011), available at http://www.education.nh.gov/instruction/special_ed/documents/procedural_safeguards_handbook_December_2011.pdf; PA. OFFICE OF DISPUTE RESOLUTION, *PROCEDURAL SAFEGUARDS NOTICE* (2011), available at <http://odr-pa.org/parents/parent-resource-library/procedural-safeguards-notice>; STATE OF WASH. OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, *NOTICE OF SPECIAL EDUCATION PROCEDURAL SAFEGUARDS FOR STUDENTS AND THEIR FAMILIES* (2009), available at <http://www.k12.wa.us/SpecialEd/pubdocs/PS.pdf>. Of these seven states, Arkansas and Pennsylvania are the only two that still appear to definitively exclude attorneys from mediation. ARK. DEP’T OF EDUC., *MEDIATION PROCESS 1* (2008), available at <https://arksped.k12.ar.us/documents/disputeresolution/MEDIATIONPROCESS.pdf> (“Attorneys shall not

Resolution sessions, on the other hand, may often feel like a second IEP meeting, as they must include members of the IEP team with specific knowledge of the complaint.¹¹⁰ The resolution sessions, however, have several unique features distinguishing them from both IEP meetings and mediations. First, unlike IEP meetings or mediations, if parents do not bring an attorney to the resolution session, then schools cannot bring their attorneys.¹¹¹ While at first blush this rule seems beneficial to parents, school administrators are repeat players who are more knowledgeable about the law and potential remedies, and so this rule is unlikely to diminish information asymmetries, particularly for language-minority parents who are unlikely to have access to the full spectrum of special education materials available to English-speaking parents. Also unlike IEP

participate in the mediation process.”); PA. OFFICE FOR DISPUTE RESOLUTION, YOUR GUIDE TO MEDIATION 2, <http://odr-pa.org/wp-content/uploads/pdf/medguide.pdf> (last visited Dec. 18, 2013) (“Attorneys may not participate on behalf of either party.”) Delaware now appears to allow attorneys. DEL. DEP’T OF EDUC. EXCEPTIONAL CHILDREN RESOURCES, *supra*, at 8. (“You are permitted to be accompanied and advised at mediation by an individual of your choice.”) Maine allows attorneys at mediation, but attorneys must file a notice of appearance with the school at the Maine Department of Education at least seven days prior to the mediation. *Procedural Safeguards*, ME. DEP’T OF EDUC., <http://www.maine.gov/doe/specialed/laws/proceduralsafeguards/index.html> (follow “English” hyperlink) (last visited Dec. 18, 2013). New Hampshire does not specifically exclude attorneys in mediations, but if a party is “accompanied and advised at mediation by individuals with special knowledge or training with respect to the needs of children with disabilities,” that party must notify the other of this individual’s attendance at least five days prior to the mediation conference. N.H. REV. STAT. ANN. § 186-C:24(I)(b) (LexisNexis 2013). In Washington, “either party may invite other people to participate in the mediation.” *Request Mediation*, STATE OF WASH. OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, <https://www.k12.wa.us/SpecialEd/DisputeResolution/mediation.aspx> (last visited Dec. 18, 2013). OSEP argues for the right to exclude attorneys as part of the voluntary nature of the mediation process:

Because mediation is voluntary on the part of the parties, either party has the right not to participate for any reason, including if the party objects to the person the other party wishes to bring to the mediation session. This could include a party’s objection to the attendance of any attorney representing either the parent or the public agency. For example, if the parent wishes to bring an attorney to the mediation session and the LEA object, the parent may choose not to participate.

OSEP Memo 13-08, *supra* note 92, Question A-12.

110. 34 C.F.R. 300.510(a)(1) (2013). For this reason, among others, some states encourage the use of third-party facilitators at these resolution sessions, as well as offering facilitation services at the initial IEP meetings. *See, e.g.*, TIMOTHY HEDEEN ET AL., CADRE, INDIVIDUALIZED EDUCATION PROGRAM (IEP)/INDIVIDUALS FAMILY SERVICE PLAN (IFSP) FACILITATION: PRACTICAL INSIGHTS AND PROGRAMMATIC CONSIDERATIONS (2013), *available at* <http://www.directionservice.org/cadre/pdf/IEPIFSPFacilnsightsJAN2013.pdf>.

111. 20 U.S.C. § 1415(f)(B)(i)(III) (2012).

meetings or mediation, the parties may void any agreement reached within three business days.¹¹² Finally, unlike mediation, these resolution sessions are not automatically confidential, which means that the discussions that take place could be used against the parties in any subsequent hearings.¹¹³ It is important to understand the differences between mediation and resolution sessions, because resolution sessions are now the presumptive dispute resolution option, and may be replacing mediation as the primary post-complaint dispute resolution process.¹¹⁴ The parties may find themselves compelled to testify about conversations that they did not know were admissible in court.¹¹⁵

Parents are not left to wander this maze entirely on their own. Schools are required to give parents of a child with a disability a “Procedural Safeguards Notice” outlining their options at least once a year.¹¹⁶ The notice must also be in understandable language and in the native language of the parent “unless it is clearly not feasible to do so.”¹¹⁷ Further, as discussed more fully below, some school

112. § 1415(f)(B)(iv).

113. As OSEP explains it, “Nor is there any separate requirement, such as that in 34 C.F.R. § 300.506(b)(8) for mediation discussions, requiring parties to resolution meetings to keep the discussion that occur in those meetings confidential.” OSEP Memo 13-08, *supra* note 92, Question D-16.

114. Settlement rates from these resolution sessions are generally low (19% to 24%), but the rate of agreement increases to 41–70% when the resolution sessions are facilitated. *Trends in Dispute Resolution under the Individuals with Disabilities Education Act (IDEA)*, CADRE, http://www.directionservice.org/cadre/pdf/FINAL_TrendsInDRUnderIDEA_5Oct12.pdf (last visited Dec. 18, 2013). Such promising statistics tend to argue in favor of the increased use of third parties to help lead discussions about special education. However, there is a danger that parties who are used to mediation will assume that the protections they are used to seeing in the mediation process, such as confidentiality and privilege, exist in these resolution sessions, when, in fact, they do not.

115. OSEP has advised that schools cannot make confidentiality a pre-condition to the resolution session, i.e., the discussions themselves cannot be confidential, but they can make the ultimate written agreement confidential. OSEP Memo 13-08, *supra* note 92, Question D-16.

116. 20 U.S.C. § 1415(d). They must also provide this notice when a child is referred for evaluation, when a parent requests an evaluation, when a parent files a complaint, or upon request by a parent. *Id.*

117. 34 C.F.R. § 300.503(c)(1) (2013). Federal regulations require that the notice be in “understandable language,” which means that the notice must be “written in language understandable to the general public” and “[p]rovided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.” *Id.* If there is not a written version, the public agency must take steps to ensure [t]hat the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; that the parent understands the content of the notice; and

districts have created additional resources for parents seeking to understand their options under the IDEA.

2. *The Benefits of Special Education Dispute Resolution*

The benefits of IDEA dispute resolution over more traditional litigation and other options should be clear by this point. Rather than waiting years for litigation to take its course, these dispute resolution procedures take place on a much more expedited schedule.¹¹⁸ Rather than having to consider the school's programs in the abstract, the focus under the IDEA is on a single student and his or her particular needs. Rather than relying on government officials to investigate complaints and decide whether to take action, parents can act on their own initiative. Further, the IDEA's dispute resolution procedures ought to be flexible enough to allow discussions about a broad range of education rights, including those found in the EEOA and NCLB, although OSEP guidance appears to actively discourage using the process for issues other than IDEA-related disputes.¹¹⁹ And finally, these dispute resolution procedures work in a significant number of cases, providing benefits to the student quickly and efficiently, while maintaining or even strengthening the relationship between parents and school.¹²⁰ Indeed, one of the biggest contributions dispute

[t]hat there is written evidence that the requirements [above] have been met.

§ 300.503(c)(2). Some states require that notices be in certain languages based on the student population of the school district. California, for example, requires that all "notices, reports, statements, or records" be translated into a student's primary language if at least fifteen percent of the pupils enrolled in the school speak that language. Parents can respond in either English or their primary language. CAL. EDUC. CODE § 48985(a) (West 2006). All of this requires that parents are literate in their native language.

118. Under the IDEA, a resolution session must be convened within fifteen days of parents' filing a due process complaint. 20 U.S.C. § 1415(f)(1)(B)(i)(I). A mediation must be convened within thirty days of the parents' complaint. § 1415(f)(1)(B)(ii) ("If the local educational agency has not resolved the complaint to the satisfaction of the parents within thirty days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.").

119. While these are private discussions and parties can talk about anything they like, OSEP's guidance says the types of issues that can be the subject of mediation are matters "under 34 CFR part 300" seeming to limit the discussion to IDEA matters only. OSEP Memo 13-08, *supra* note 92, Question A-6.

120. For instance, California settled sixty-five percent of its special education mediations in 2012–2013. OFFICE OF ADMIN. HEARINGS, SPECIAL EDUCATION DIVISION QUARTERLY DATA REPORT: FOURTH QUARTER 2012–2013 FISCAL YEAR APRIL 1, 2013–JUNE 30, 2013, at 11 (2013), *available at* <http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20>

resolution can make to the special education process is providing parties with a sense of procedural justice and voice. In a qualitative study interviewing parties in special education mediations in Pennsylvania, Nancy Welsh suggests that schools and parents both valued mediation most for its procedural justice, but that each group had a slightly different focus.¹²¹ Parents valued the opportunity to express their views, the assurance their views have been heard, and evenhanded, dignified treatment, while schools valued the ability to hear parents' concerns and also having parents hear and accept the norms school officials typically apply.¹²²

Yet dispute resolution in the abstract is not a panacea. Settlement agreements reached in resolution sessions or mediations are unlikely to serve as precedent for other students to receive services under the IDEA. For example, settlements do not carry the weight of a hearing officer's judgment behind them, and the agreements themselves are often confidential.¹²³ Further, some legal scholars argue that a private process simply provides a more convenient forum for the oppression of minorities.¹²⁴ While this concern is legitimate, it is not insuperable.

Q4%20FY%2012-13%20Final.pdf. Of course, as will be discussed in Part V, settlement does not always mean "success" in the eyes of parents and schools.

121. Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 580–81 (2004).

122. *Id.* at 581.

123. OSEP allows creating confidential settlements, saying that "there is nothing in the IDEA or its implementing regulations that would prohibit the parties from agreeing voluntarily to include in their mediation agreement a provision that limits disclosure of the mediation agreement, in whole or in part, to third parties." OSEP Memo 13-08, *supra* note 92, Question A-24. However, settlement agreements as to specific students cannot be used to block state complaints alleging systemic violations of the IDEA. *Id.* Question B-25.

124. A foundational work in this debate is Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359. Unfortunately, it is very hard to empirically test the interaction of race/ethnicity on mediations, and the often cited study that has been done looking at the intersection of race and mediation outcomes is nearly two decades old. Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996). Looking at co-mediated small claims cases in a predominately Anglo/Hispanic community in New Mexico, the researchers found that mediations with at least one Anglo mediator resulted in higher monetary outcomes for Anglo claimants and that minority female claimants received lower monetary outcomes when both mediators were women. *Id.* For a more contemporary discussion questioning the generalizability of these results and the interaction of minorities and mediation, see Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 CAP. U. L. REV. 819 (2011). IDEA claims present a different set of issues from the typical small claims case, but these kinds of findings highlight the need to raise awareness of the potential effect a mediator's background might have on the

Other scholars, working primarily in the context of employment disputes, have suggested that mechanisms like tracking of complaints and periodic reporting of trends in the types of disputes and parties involved can be built into these more private processes to identify and ameliorate issues of prejudice and stereotyping.¹²⁵ Indeed, school systems have begun to adopt some of these practices, particularly the use of an ombudsperson or other independent person at the district to help screen special education complaints and make referrals for services.¹²⁶

Ultimately, the greatest promise of dispute resolution procedures like mediation and facilitated meetings lies in their ability to bring parties together on an expedited timeframe, under a structured framework for discussion. Though these procedures may not be perfect, they appear to be the best opportunity that language-minority families currently have to improve the education services that their children are receiving.

resolution of a dispute. One interesting finding in the New Mexico study, which has not received as much publicity as the monetary outcomes but is also applicable to the IDEA context is that most of the “effect of disputants’ ethnicity and gender on monetary outcomes is explained by repeat-player variables—especially for adjudicated cases.” LaFree & Rack, *supra*, at 788–89. This finding is especially germane to IDEA disputes, where schools are nearly always repeat players in the process, while parents may be making an IDEA claim for the first time.

125. Susan Sturm, *Race, Gender and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 678–80 (1998); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 48–51 (2007).

126. Arizona has two “Early Resolution Specialists” who provide “technical assistance to constituents seeing early resolution of complaints.” *Early Resolution Specialists*, ARIZ. DEP’T EDUC., <http://www.azed.gov/special-education/dispute/early-resolution-specialists> (last visited Dec. 18, 2013). South Carolina appears to have an ombudsman who works on resolving all educational complaints by parents, not just IDEA complaints. *Ombudsman*, S.C. STATE DEP’T OF EDUC., <http://ed.sc.gov/agency/lpa/public-affairs/Ombudsman.cfm> (last visited Dec. 18, 2013). Virginia has a Parent Ombudsman for special education who “acts as a source of information and referral, aids in answering individuals’ questions, and assists in the resolution of concerns and issues.” *Ombudsman—Frequently Asked Questions*, VA. DEP’T EDUC., http://www.doe.virginia.gov/special_ed/resolving_disputes/ombudsman/index.shtml (last visited Dec. 18, 2013). Washington has a Special Education Ombudsman “to help parents resolve disagreements with school districts about special education services quickly, fairly, and at the lowest level possible.” *Need Assistance?—Special Education Ombudsman*, OFFICE SUPERINTENDENT PUB. INSTRUCTION, <http://www.k12.wa.us/SpecialEd/Families/Assistance.aspx> (last visited Dec. 18, 2013).

III. THE USE OF IDEA DISPUTE RESOLUTION IN URBAN SCHOOLS

States have significant latitude in how they choose to satisfy the IDEA's dispute resolution requirements.¹²⁷ During the sixteen years since mandatory dispute resolution was first put in place, the states have adopted a wide range of solutions. As this Article discusses both above and below, the details of a state's dispute resolution program can significantly affect language-minority parents' ability to enforce their statutory rights. It is important that information be available in the parents' native language, of course, but also important are the dispute resolution procedures adopted, the training and background given to mediators, and school administrators' awareness of particular problem areas for language-minorities, among other things.

To begin to see how ELLs and their families actually experience the IDEA's protections, this Part surveys large, urban school districts in the three most populous states—California,¹²⁸ New York,¹²⁹ and Texas.¹³⁰ These areas have large ELL populations and so have

127. 20 U.S.C. § 1415 (2012). OSEP provides a model Procedural Safeguards Notice for schools. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., GUIDANCE ON REQUIRED CONTENT OF FORMS UNDER PART B OF THE IDEA (2009), available at http://idea.ed.gov/download/modelform_Procedural_Safeguards_June_2009.pdf.

128. The cities and districts examined were: Los Angeles (Los Angeles Unified School District (USD)); Sacramento (Elk Grove USD, San Juan USD, Sacramento City USD); San Diego (San Diego USD); San Francisco (San Francisco USD); San Jose (San Jose USD); and Riverside (Corna-Norco USD and Riverside Unified).

129. The New York City Department of Education was examined. Unlike California and Texas, in which major metro areas are composed of many autonomous districts, loosely connected in policy by state laws, the New York City Department of Education (NYCDOE) covers a metro area of over one million students. See *Statistical Summaries*, N.Y.C. DEP'T EDUC., <http://schools.nyc.gov/AboutUs/data/stats/default.htm> (last visited Dec. 18, 2013). Of those million-plus students, 146,196 (14.1%) are ELLs and 164,908 (15.9%) receive special education services. *Id.* Citywide, 21.6% of ELLs had IEPs for the 2012–2013 school year, with the highest concentration, 34.8%, in Staten Island. N.Y.C. DEP'T OF EDUC., OFFICE OF ENGLISH LANGUAGE LEARNERS, 2013 DEMOGRAPHIC REPORT 6 (2013), available at http://schools.nyc.gov/NR/rdonlyres/FD5EB945-5C27-44F8-BE4B-E4C65D7176F8/0/2013DemographicReport_june2013_revised.pdf. These numbers are even higher for what NYC terms “long-term ELLs,” students who continue to require ELL services after six years. *Id.* Among long-term ELLs, 47.5% had IEPs. *Id.*

130. The cities and districts examined were: Austin (Austin Independent School District (ISD) and Round Rock ISD); Dallas-Fort Worth (Dallas ISD, Fort Worth ISD, and Arlington ISD); Houston (Houston ISD); and San Antonio (Northside ISD, North East ISD, and San Antonio ISD). Population data based on the 2010 U.S. Census list of *Qualifying Urban Areas for the 2010 Census*, FED. REGISTER,

significant incentives to consider ELLs in designing their special education dispute resolution programs.¹³¹ A survey of districts in these states gives a good overview of the practices and procedures that language-minorities have to work with in public schools today.¹³² Specifically, this survey looks at these districts' practices in five different areas: the procedural safeguard notices that districts are required by law to provide; their translation and interpretation services; the types of dispute-resolution procedures they have implemented; the use of parent groups as another resource to other families in the district; and any ELL-specific special education services provided by the districts.

A. Procedural Safeguard Notices

States and school districts are required by law to make a "Procedural Safeguard Notice" available to parents.¹³³ At a minimum, this notice must explain the basics of special education rights, including parental complaints, dispute resolution, and due process hearings.¹³⁴ Most schools use a version that has been

<https://www.federalregister.gov/articles/2012/03/27/2012-6903/qualifying-urban-areas-for-the-2010-census#h-10>.

131. Data from the National Center for Education Statistics indicate that for the 2010–2011 school year New York had an ELL population of 208,125; Texas had an ELL population of 738,663. California did not report ELL data to the Common Core of Data, NCES's data source. *State Education Data Profiles*, NAT'L CENTER FOR EDUC. STATISTICS, <http://nces.ed.gov/programs/stateprofiles/index.asp> (last visited Dec. 18, 2012). However, the California Department of Education's estimate of its English Learner population for 2010–2011 was 1,441,387. *Statewide English Learners by Language and Grade 2010–11*, CAL. DEP'T EDUC., <http://dq.cde.ca.gov/dataquest/LepbyLang1.asp?cChoice=LepbyLang1&cTopic=LC&cLevel=State&cYear=2010-11> (last visited Dec. 18, 2012).

132. Because this Article is focused on minority parents' ability to use the IDEA to improve their children's education, this survey is limited to publicly available information—typically, information made available through the school district's web site, the state education agency, and in state laws and regulations. This technique is not perfect; school districts may not regularly update their web sites, and parents may not have ready access to the Internet or to the relevant parts of the state's law. See U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: POPULATION CHARACTERISTICS 2–3 (2013), available at <http://www.census.gov/prod/2013pubs/p20-569.pdf> (showing 76.2% of non-Hispanic White households and 82.7% of Asian households reported Internet use at home, compared with 58.3% of Hispanic households and 56.9% of Black households). At the same time, community outreach and word of mouth are likely just as important as whether the district makes information available online. Nevertheless, this survey still shows just how much dispute resolution procedures can differ from state to state and even district to district, despite all falling under a common federal scheme.

133. 20 U.S.C. § 1415(d) (2012).

134. *Id.*

promulgated by their state's department of education, which tends to track the OSEP model notice closely, and some states provide additional brochures that outline options or give examples and explanations of when and how to file certain claims. Each state surveyed posted its Procedural Safeguards Notice on its state education website.¹³⁵ Unsurprisingly, almost all of the school districts surveyed also provided access to the Procedural Safeguards Notice through their web site, often simply linking to or including their state's version of the notice.¹³⁶ In all, these Procedural Safeguard Notices appear to do little more than the minimum required by law, mirroring the legalistic language of the OSEP model, and it would be surprising if they were a primary source of useful information for language-minority parents.¹³⁷

135. See CAL. DEP'T OF EDUC., SPECIAL EDUCATION RIGHTS OF PARENTS AND CHILDREN UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, PART B, AND THE CALIFORNIA EDUCATION CODE 6 (2009), available at <http://www.cde.ca.gov/sp/se/qa/documents/pseng.pdf>; TEX. EDUC. AGENCY, NOTICE OF PROCEDURAL SAFEGUARDS (2013), available at http://framework.esc18.net/Documents/Pro_Safeguards_ENG.pdf; *Rights for Parents with Disabilities*, N.Y. STATE DEP'T EDUC. (July 2013), <http://www.p12.nysed.gov/specialed/formsnotices/psgn/psgn713.htm>.

136. The only districts that failed to provide either their own Procedural Safeguards Notice or a link back to their state's notice were Corona-Norco USD in Riverside, California; Austin ISD in Austin, Texas; and Northside ISD and San Antonio ISD in San Antonio, Texas. See, e.g., *Special Education*, CORONA-NORCO UNIFIED SCH. DISTRICT, <http://www.cnusd.k12.ca.us/Page/174> (last visited Dec. 18, 2013). It is also surprising that the Austin ISD Special Education Parent Handbook does not appear to be available in Spanish. *Special Education*, AUSTIN ISD, <http://www.austinisd.org/academics/sped> (last visited Dec. 18, 2013) (there is no link on main page and links to TEA in Resources tab is broken as of last viewing). Despite being the largest district in the San Antonio area, and having over a tenth of its students in special education, Northside ISD neither links to the TEA Procedural Safeguards Notice nor provides contact information for the Parent Advisory Committee on that group's website. *Special Education*, NORTHSIDE ISD, <http://nisd.net/academics/sped> (last visited Dec. 18, 2013). San Antonio ISD has a page about the Procedural Safeguards, but has omitted any actual link to them. *FAQs about Procedural Safeguards*, SAN ANTONIO INDEP. SCH. DISTRICT, <http://www.saisd.net/dept/sped> (follow the "Frequently Asked Questions" hyperlink) (last visited Dec. 18, 2013).

137. For example, New York mirrors the OSEP model with this explanation about amending a child's educational records:

If, as a result of the hearing, the participating agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of your child, it must inform you of your right to place in the records that it maintains on your child a statement commenting on the information or providing any reasons you disagree with the decision of the participating agency.

Rights for Parents with Disabilities, *supra* note 135, at 12. Texas provides the simplified:

B. Translations and Interpreters

Each of the three states surveyed provided translations of the Procedural Safeguards Notices into at least one language other than English.¹³⁸ In each state, some local districts also provide the Procedural Safeguards Notice in more languages than the state does, reflecting their local language-minority populations.¹³⁹ For example, while Los Angeles Unified School District's (USD's) ELL population is overwhelmingly Latino, the district makes its notice available in Armenian, Chinese, English, Korean, Spanish, Tagalog, and Vietnamese.¹⁴⁰ San Francisco USD makes its entire web site available in Spanish and Chinese,¹⁴¹ and it makes an abridged version of the California Procedural Safeguards Notice available in Cantonese,

If, as a result of the hearing, the school decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of your child, you must be informed of your right to place a statement commenting on the information in your child's records for as long as the record or contested portion is maintained by the school.

TEX. EDUC. AGENCY, *supra* note 135, at 8. California, interestingly, omits this passage entirely since the law itself only requires that the notice contain information on "access to education recordings." 20 U.S.C. § 1415(d)(2)(D); *see also* CAL. DEP'T OF EDUC., *supra* note 135, at 6.

138. In addition to English, Texas provides its notice in Spanish. *Parent Resources*, DALLAS INDEP. SCH. DISTRICT, <http://www.dallasisd.org/Page/1346> (last visited Dec. 18, 2013). California provides its notice in simplified and traditional Chinese, Spanish, Tagalog, and Vietnamese. *Clearinghouse for Multilingual Documents*, CAL. DEP'T EDUC., <http://inet2.cde.ca.gov/cmd/translatedparentaldoc.aspx?docid=759-768> (last visited Dec. 18, 2013). New York provides its notice in Chinese, Haitian Creole, Korean, Spanish, and Russian. *Rights for Parents with Disabilities*, *supra* note 135.

139. *See, e.g., Special Education Parents' Rights—Short Version*, SACRAMENTO CITY UNIFIED SCH. DISTRICT, <http://www.scusd.edu/document/special-education-parents-rights-short-version> (last visited Dec. 18, 2013) (featuring two-page summaries in Chinese, Hmong, Spanish, Russian, and Vietnamese, which include explanation of mediation); *Parent Services Office*, SAN DIEGO UNIFIED SCH. DISTRICT, <http://www.sandi.net/page/2026> (last visited Dec. 18, 2013) (featuring notices in Spanish, Vietnamese, Tagalog, Somali, and Cambodian, but Tagalog and Cambodian are not available online).

140. In 2010–2011, Spanish speakers were ninety-three percent of the English learners in the Los Angeles Unified School District. *District Profile Selection Page*, L.A. UNIFIED SCH. DISTRICT, <http://search.lausd.k12.ca.us/cgi-bin/fccgi.exe?w3exec=PROFILE0> (last visited Dec. 18, 2013). Los Angeles Unified School District (LAUSD) is just one of eighty school districts located in Los Angeles County. *Los Angeles County School Districts*, L.A. COUNTY OFFICE EDUC., <http://schooldirectory.lacoe.edu> (last visited Dec. 18, 2013). It is by far the largest, however, with 662,140 students during the 2011–2012 school year. *Largest & Smallest Public School Districts—CalEdFacts*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/ds/sd/cb/ceflargesmalldist.asp> (last visited Dec. 18, 2013).

141. S.F. UNIFIED SCH. DISTRICT, <http://www.sfusd.edu> (last visited Dec. 18, 2013).

English, Mandarin, Spanish, Tagalog, and Vietnamese.¹⁴² New York City’s Department of Education goes even further. Its Parent Guide to Special Education provides that parents “have the right to request your child’s IEP *and evaluations* in your preferred language”.¹⁴³ The district’s special education website states—in English as well as Arabic, Bengali, Chinese, French, Haitian Creole, Korean, Russian, Spanish, and Urdu—that “[t]he school will take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting.”¹⁴⁴ These districts were outliers, however, and most others provided significantly less information in languages other than English. Similarly, many of the surveyed school districts provided generic translation through a web-based service such as Google Translate; only a few provided what appeared to be more professional translations in particular languages.¹⁴⁵ This apparent unavailability of other school resources in translation could significantly affect the ability of language-minority parents to navigate the educational bureaucracy and get the help their children need.¹⁴⁶

Little information was found regarding the surveyed school districts’ in-person interpretation services, although a few districts have addressed this issue by providing translation and interpretation

142. *Parent Resources*, S.F. UNIFIED SCH. DISTRICT, <http://www.sfusd.edu/en/programs/special-education/parent-resources.html> (last visited Dec. 18, 2013). In 2012, 25% of the district’s 52,989 students were ELLs, and 11% were receiving special education services. *Facts at a Glance*, S.F. UNIFIED SCH. DISTRICT, <http://www.sfusd.edu/en/assets/sfusd-staff/about-SFUSD/files/sfusd-facts-at-a-glance%20-2013.pdf> (last visited Dec. 18, 2013). The two different Chinese dialects available reflect a student population that is 32% Chinese. *Id.*

143. N.Y.C. DEP’T OF EDUC., PARENT GUIDE TO SPECIAL EDUCATION 36, available at http://schools.nyc.gov/NR/rdonlyres/DBD4EB3A-6D3B-496D-8CB2-C742F9B9AB5C/0/ParentGuidetoSpecialEd_090712_English.pdf (last visited Dec. 18, 2013) (emphasis added). This helpful addition is codified in New York’s state education regulations, which say that “the results of the evaluation are provided to the parents in their native language or mode of communication, unless it is clearly not feasible to do so.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b)(6)(xii) (2012).

144. *Parent’s Rights and Responsibilities*, N.Y.C. DEP’T EDUC., <http://schools.nyc.gov/Academics/SpecialEducation/tellmemore/parents-rights.htm> (last visited Dec. 18, 2013). The Parent’s Guide to Special Education Services is also available in these languages. *A Shared Path to Success: A Parent’s Guide to Special Education Services for School-Age Children*, N.Y.C. DEP’T EDUC., <http://schools.nyc.gov/Academics/SpecialEducation/tellmemore/importantDocument s.htm> (last visited Dec. 18, 2013).

145. For an example of a Google translation, see L.A. UNIFIED SCH. DISTRICT, <http://home.lausd.net> (last visited Dec. 18, 2013) (follow the “En Español” hyperlink).

146. None of the other districts surveyed rose to the level of New York in terms of purporting to provide documents to parents in languages other than English.

services, or by holding informational meetings in common local languages.¹⁴⁷

C. Dispute Resolution Procedures

1. Mediation

Each state has a slightly different framework for providing the required mediation services. In California, special education mediations are conducted through the California Office of Administrative Hearings (OAH), whose administrative hearing officers serve both as mediators and as triers of fact, but not on the same case.¹⁴⁸ Texas's pool of mediators is mostly drawn from the same rolls as its due process hearing officers.¹⁴⁹ Unlike in California and Texas, where the mediators also perform hearing officer

147. San Francisco's website links prominently to its Translation and Interpretation Services unit, and moves the link higher up the page when the site is in its Spanish or Chinese mode. *Compare* S.F. UNIFIED SCH. DISTRICT, <http://www.sfusd.edu/en> (last visited Dec. 18, 2013), with S.F. UNIFIED SCH. DISTRICT, <http://www.sfusd.edu/es> (last visited Dec. 18, 2013). Many districts in Texas appear to hold at least some parent special education information meetings in Spanish, and Houston ISD appears to have held meetings in Vietnamese as well. *See 2013–2014 Family Support Groups & Parent Training*, SAN ANTONIO INDEP. SCH. DISTRICT, <http://nova.saisd.net/storage/uploads/SpecialEducation/2013-2014%20Support%20Group%20flyer%20english-spanish.pdf> (last visited Dec. 18, 2013) (English and Spanish meetings); *Austin Family Support Cooperative Meeting*, AUSTIN INDEP. SCH. DISTRICT, <http://eparentsupport.org/page.php?23> (last visited Dec. 18, 2013) (English and Spanish meetings); *Parent Meeting and Advisory Committee Meeting Notes*, HOUS. INDEP. SCH. DISTRICT, <http://www.houstonisd.org/site/default.aspx?PageType=3&DomainID=15681&ModuleInstanceID=84775&ViewID=047E6BE3-6D87-4130-8424-D8E4E9ED6C2A&RenderLoc=0&FlexDataID=58557&PageID=58602> (last visited Dec. 18, 2013); *Special Education Parent Intake Center*, DALLAS INDEP. SCH. DISTRICT, <http://www.dallasisd.org/Domain/7843> (last visited Dec. 18, 2013) (bilingual staff workers at Parent Intake Center).

148. *Special Education*, CAL. OFFICE ADMIN. HEARINGS, <http://www.dgs.ca.gov/oah/SpecialEducation.aspx> (last visited Dec. 18, 2013). California law provides that special education mediators shall not be employees of the California Department of Education, but of "another state agency" or "a nonprofit organization or entity." CAL. EDUC. CODE § 56504.5(a) (West 2003). California is alone among the states surveyed in releasing comprehensive data on the results of its dispute resolution programs. *Special Education Reports Archive*, CAL. OFFICE ADMIN. HEARINGS, <http://www.dgs.ca.gov/oah/SpecialEducation/Resources/SEReportArchive.aspx> (last visited Dec. 18, 2013). In the 2012–2013 fiscal year, the OAH conducted 1859 mediations, with a settlement rate of 65%. OFFICE OF ADMIN. HEARINGS, *supra* note 120, at 11. In 2012–2013, there were 418 non-English speaking students identified through hearing request forms, of whom 376 (90%) spoke Spanish. *Id.* at 17.

149. TEX. EDUC. AGENCY, SPECIAL EDUCATION DISPUTE RESOLUTION SYSTEMS HANDBOOK 8 (2013), available at www.tea.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=25769806827&libID=25769806830.

functions, the New York State Education Department contracts its special education mediations to the New York State Dispute Resolution Association (NYSDRA), which has twenty-four Community Dispute Resolution Centers in the state.¹⁵⁰

California forbids parties from bringing attorneys to pre-due-process filing mediations.¹⁵¹ The State Legislature explains this choice as promoting a “nonadversarial atmosphere” and explicitly excludes “attorneys or other independent contractors used to provide legal advocacy services.”¹⁵² Attorneys are allowed to participate in mediation conferences scheduled after the filing of a due process complaint, however.¹⁵³ By contrast, both New York and Texas allow advocates and attorneys to participate in all mediations.¹⁵⁴

150. *Mediation Services for Special Education*, N.Y. STATE EDUC. DEP'T, <http://www.p12.nysed.gov/specialed/techassist/mediation.htm> (last visited Dec. 18, 2013). The Dispute Resolution Association's website clarifies that while the state pays for the mediator, the school district pays for any interpreters. *See Special Education*, N.Y. STATE DISP. RESOL. ASS'N, <http://www.nysdra.org/consumer/specialeducation/specialeducation.aspx> (last visited Dec. 18 2013) (“If an interpreter is needed, a parent may decide to bring a friend or family member. The CDRC may have one on staff, or may be able to arrange one from the court system. An outside interpreter may be brought in at the district's expense.”). A report published by New York's court system seems to indicate that there were only 341 cases referred for special education mediation in New York State in 2011–2012, of which 218 mediations were conducted and 88% of those were resolved. N.Y. STATE UNIFIED COURT SYS., COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM STATISTICAL SUPPLEMENT 22 (2011–2012), *available at* http://www.nycourts.gov/ip/adr/Publications/Statistical_Supplement/SS2011-12.pdf. This number feels low for a state of New York's size, as compared to the 1807 mediations held in California that same year. OFFICE OF ADMIN. HEARINGS, SPECIAL EDUCATION DIVISION SECOND AMENDED QUARTERLY DATA REPORT: FOURTH QUARTER 2012–2013 FISCAL YEAR APRIL 1, 2013–JUNE 30, 2013, at 12 (2013), *available at* <http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20Q4%20FY%2011-%2012%20Final%20SECOND%20AMENDED.pdf>. California's population is about five times as large as New York's, so you would expect about 300–400 mediations in New York.

151. CAL. DEP'T OF EDUC., *supra* note 135, at 6 (“[T]he parent or the school district may be accompanied and advised by non-attorney representatives and may consult with an attorney prior to or following the conference.”).

152. CAL. EDUC. CODE § 56500.3(a) (West 2003). Parents who happen to be attorneys may participate in pre-filing mediations. EDUC. § 56500.3(b).

153. CAL. EDUC. CODE § 56501(b)(2) (West 2003).

154. *Helping Parents and School Districts Become More Effective Partners: Special Education Mediation*, N.Y. STATE DISP. RESOL. ASS'N, INC., http://www.nysdra.org/consumer/specialeducation/specialeducation.aspx#Who_attend; TEX. EDUC. AGENCY, *supra* note 149, at 8.

2. Other Dispute Resolution Methods

Some districts offer dispute resolution services beyond those offered at a state level. While neither California nor Texas requires IEP facilitation, some districts in both states provide it.¹⁵⁵ Some districts in New York have facilitators attend resolution sessions,¹⁵⁶ and while New York City does not seem to encourage facilitation of IEP meetings, it does encourage the presence of Parent IEP Team Members, third-party parents who attend meetings and help explain the IDEA process.¹⁵⁷

In Los Angeles USD, a Complaint Response Unit/Parent Resource Network initially handles special education complaints, makes written responses that may include proposed remedies and referral information, and tracks school responses to parent complaints.¹⁵⁸

155. Sacramento City USD mentions “IEP facilitation,” “ADR Resource Parents,” and “Solution Panels/Teams.” Resource Parents appear to be on-call for questions during the IEP process, while the Solution Team appears to be a co-mediation team “typically composed of one parent of a child with disabilities and one educator.” *Alternative Dispute Resolution*, SACRAMENTO CITY UNIFIED SCH. DISTRICT, <http://www.scusd.edu/resource/alternative-dispute-resolution-adr> (last visited Dec. 18, 2013). *Id.* It is unclear whether these individuals must have formal mediation training. The two other largest school districts near Sacramento, Elk Grove, and San Juan USD, mention the use of “alternative dispute resolution (ADR)” in addition to “mediation,” but neither discusses just what those additional processes entail. See SAN JUAN UNIFIED SCH. DIST., SPECIAL EDUCATION PARENT HANDBOOK 20 (2010), available at <http://www.sanjuan.edu/files/554/the%20parent%20handbook%20booklet.pdf>; *Parent Rights*, ELK GROVE UNIFIED SCH. DISTRICT, <http://blogs.egusd.net/specialed/parent-informationtranslation/parent-rights> (last visited Dec. 18, 2013). San Juan provides a nice, simplified definition of a mediator as “a person who is trained in strategies that help people come to agreement over difficult issues.” SAN JUAN UNIFIED SCH. DIST., *supra*, at 20. The Texas Education Agency (TEA) notes that “[s]ome school districts have begun using neutral meeting facilitators to assist ARD committee in resolving disagreements.” TEX. EDUC. AGENCY, *supra* note 149, at 5. The TEA also notes that the facilitated ARD meeting “is commonly referred to as a ‘facilitated IEP meeting.’” *Id.*

156. The New York State Dispute Resolution Association’s website notes that facilitators may be present at resolution session meetings as well: “In a resolution session, the district may, but is not required to, have an individual attend to facilitate the discussion between the parent and the district.” *Special Education*, N.Y. STATE DISP. RESOL. ASS’N, <http://www.nysdra.org/consumer/specialeducation/specialeducation.aspx> (last visited Dec. 18, 2013).

157. *Parent IEP Team Members*, N.Y.C. DEP’T EDUC., <http://schools.nyc.gov/Academics/SpecialEducation/when-is-the-next/parentTeamMember.htm> (last visited Dec. 18, 2013). Parent Team Members are paid up to fifty dollars per day for their participation. *Id.*

158. L.A. UNIFIED SCHOOL DIST., PARENT-STUDENT HANDBOOK 22 (2013), available at http://home.lausd.net/pdf/Families_Forms/2013-2014_Parent_Student_Handbook.pdf.

The Complaint Response Unit (CRU)/Parent Resource Network (PRN) provides information and training for parents of students with disabilities

California's Riverside USD offers an "Informal Dispute Resolution" process in which an IEP administrator meets with parents to discuss disagreements about IEPs,¹⁵⁹ looks into parents' complaints and then offers a proposed settlement, which the parent can either accept or reject.¹⁶⁰

D. Parent Groups and Outreach

While the IDEA calls for a state-level special education advisory panel that includes parents of children with disabilities, districts in all three states also have their own local-level panels.¹⁶¹ California's state

related to the District's special education policies and procedures, the Modified Consent Decree, and the District's special education programs The CRU/PRN gives the District an opportunity to provide lawful responses to parent complaints without the need for parents to resort to external complaint and due process mechanisms After a complaint has been received and investigated, the CRU/PRN provides a lawful response, which is a written response that satisfies the District's legal obligations and may be one of the following: (1) a remedy and, where appropriate, the date by which the remedy shall be implemented; (2) information that an appropriate referral has been made; (3) suggested action the complainant may wish to take; or (4) a determination that the complaint has been investigated and determined to be unfounded.

Id. Since 1996, the LAUSD has been subject to a federal consent decree relating to special education. *See* Modified Consent Decree at 17–22, *Smith v. L.A. Unified Sch. Dist.*, No. CV 93-7044-LEW(GHKx) (W.D. Cal. May 14, 2003), *available at* http://oimla.com/pdf/20030512/mcd_text_05122003.pdf; Modified Consent Decree Study, L.A. UNIFIED SCH. DISTRICT, http://notebook.lausd.net/portal/page?_pageid=33,131645&_dad=ptl&_schema=PTL_EP (last visited Dec. 18, 2013). An Office of the Independent Monitor was created to assure compliance with the consent decree. *See* OFFICE INDEP. MONITOR, <http://oimla.com> (last visited Dec. 18, 2013).

159. RIVERSIDE UNIFIED SCH. DISTRICT, NOTICE OF PROCEDURAL SAFEGUARDS AND PARENTS' RIGHTS 4 (2012), *available at* <http://www.rusdlink.org/cms/lib3/CA01001728/Centricity/domain/72/parent%20rights/Procedural%20Safeguards-English%208-2012.pdf>.

160. Riverside Unified School District, Informal Dispute Resolution Activity IDR Form B—Settlement Offer/Agreement Template, *available at* http://www.rusdlink.org/cms/lib3/CA01001728/Centricity/domain/72/idr/IDR%20Form%20B_%20Settlement%20Agreement%206-2012.pdf. One option on the Settlement Offer form is whether it will remain confidential. *Id.* at 3. The district says that this process is "designed to be faster, less formal and less adversarial than mediation and due process proceedings." RIVERSIDE UNIFIED SCH. DISTRICT, *supra* note 159, at 4. Unlike pre-filing mediation, attorneys are allowed to be "present during the IDR negotiation process and/or review any settlement agreement reached between the parties." RIVERSIDE UNIFIED SCH. DISTRICT, PARENT OPTIONS FOR IEP DISPUTE RESOLUTION 1 (2012), *available at* <http://www.rusdlink.org/cms/lib3/CA01001728/Centricity/domain/72/idr/IDR%20Parent%20Options%206-2012%20ENG%20.pdf>.

161. 20 U.S.C. § 1412(a)(21) (2012); *infra* notes 173–76 and accompanying text.

Education Code requires that each Special Education Local Plan Area (SELPA) create a Community Advisory Committee, whose duties include advising on the creation of a local education plan, recommending annual priorities, assisting in parent education, and encouraging community involvement.¹⁶² Texas does not appear to require local-level special education advisory committees, but many districts have them.¹⁶³ New York City has a Citywide Council on Special Education, of which nine of eleven members must be parents of students with IEPs, and the two remaining members “must have extensive experience and knowledge in education, training, or employing individuals with disabilities.”¹⁶⁴ Parent call-in lines and

162. CAL. EDUC. CODE § 56190 (West 2013). The majority of each CAC’s members must be parents in the district, and of those parents, the majority must have children in special education. *Id.* § 56193. These groups appeared to have differing degrees of organization and involvement. Appropriately for the Silicon Valley, San Jose USD’s Community Advisory Committee has its own Facebook page. *SJUSD Community Advisory Committee for Special Education*, FACEBOOK, <https://www.facebook.com/SJUSD.CACSE> (last visited Dec. 18, 2013). Other than that, there was little notable about San Jose USD. It provides Spanish translations for a number of pages on its web site, but apparently not its Procedural Safeguards Notice. The English version of this Notice does not mention any additional dispute resolution procedures beyond the standard California options. SAN JOSE UNIFIED SCH. DIST., NOTICE OF PROCEDURAL SAFEGUARDS 5–6 (2008), available at http://www.sjUSD.org/pdf/parents/Procedural_Safeguards.pdf.

163. Austin ISD has a Family Support Cooperative for families of students with special needs, and notes that at its meetings “Spanish and sign language interpreters will be available.” *Parent Support Cooperative*, AUSTIN INDEP. SCH. DISTRICT, <http://eparentsupport.org/page.php?23> (last visited Dec. 18, 2013). Austin also has a Special Education Advisory Committee “composed of teachers, principals, business representatives, community representatives, and parents of students who receive special education services” *About SEAC*, AUSTIN INDEP. SCH. DISTRICT, <http://www.austinisd.org/advisory-bodies/seac/about> (last visited Dec. 18, 2013). Other Texas districts with parent support groups or advisory committees include: Arlington ISD, Fort Worth ISD, Houston ISD, Northside ISD, and San Antonio ISD. See *2013–2014 Family Support Groups & Parent Training*, *supra* note 147; *Parent Meetings and Advisory Committee Meetings*, HOUS. INDEP. SCH. DISTRICT, <http://www.houstonisd.org/site/default.aspx?PageType=3&DomainID=15681&ModuleInstanceID=84775&ViewID=047E6BE3-6D87-4130-8424-D8E4E9ED6C2A&RenderLoc=0&FlexDataID=58557&PageID=58602> (last visited Dec. 18, 2013); *Special Education Advisory Committee*, ARLINGTON INDEP. SCH. DISTRICT, www.aisd.net/AISD/Parents/AdvisoryCommittee/tabid/6896/Default.aspx (last visited Dec. 18, 2013); *Special Education Advisory Committee*, FORT WORTH INDEP. SCH. DISTRICT, http://www.fwisd.org/pages/FWISD/Departments_Programs/Departments__L-Z_/Special_Education/Services/Special_Education_Advisory_Com (last visited Dec. 18, 2013); *Special Education: Parent Advisory Committee*, NORTHSIDE INDEP. SCH. DISTRICT, <http://nisd.net/academics/sped/parents> (last visited Dec. 18, 2013).

164. *Citywide Council on Special Education*, N.Y.C. DEP’T EDUC., <http://schools.nyc.gov/Offices/CEC/GPInformation/CitywideCouncilonSpecialEducation/default.htm> (last visited Dec. 18, 2013).

information centers are another common approach for disseminating information to families.¹⁶⁵ More research should be done on how often language-minority families make use of these resources.

E. Specific Services for ELLs in Special Education

Unfortunately, few districts provide explicit information on how special education services are provided to ELLs.¹⁶⁶ A number of districts appear aware of this subgroup, however. Houston ISD, for instance, appears to be closely tracking the number of ELLs in special education, with the goal of reducing their numbers.¹⁶⁷ And California's San Diego USD has implemented a series of "pre-referral

165. Texas has a statewide special education "Toll-free Parent Information Line" available for special education information. TEX. EDUC. AGENCY, *supra* note 135, at 11. Round Rock ISD, near Austin, Texas, has designated district administrators called "Parent Liaisons" who are available to provide help, "information about services provided by the school district," or "emotional support" to parents of children receiving special education. *Special Ed Parent Liaisons*, ROUND ROCK INDEP. SCH. DISTRICT, <http://special-ed-parent-liaisons.wikispaces.com/Parent+Liaisons> (last visited Dec. 18, 2013). Dallas ISD has a Special Education Parent Intake Center, which is designed to be "a point of access for parents with students in special education" and is "staffed by two bilingual social workers and supported by central staff from the district's Special Education Department." *Special Education Parent Intake Center*, *supra* note 147. San Diego USD has a special education Parent Services Office, which runs a "Parent Helpline." *Parent Services Office*, *supra* note 139. New York City has its own Special Education Hotline. *A Shared Path to Success: Special Education in New York City*, N.Y.C. DEP'T EDUC., <http://schools.nyc.gov/academics/specialeducation/default.htm>.

166. Of the districts discussed below, recall that San Francisco was the district at issue in the famous *Lau* case. *See supra* note 64 and accompanying text.

167. Houston ISD classified 60,586 (29.8%) of its students as Limited English Proficient in 2012–2013 and 15,998 (7.9%) as eligible for special education. *2012–2013 Facts and Figures*, HOUS. INDEP. SCH. DISTRICT, <http://www.houstonisd.org/site/Default.aspx?PageType=6&SiteID=4&SearchString=60,586> (last visited Dec. 18, 2013). In the past, the percentage of ELLs with disabilities was relatively proportional to the overall population of ELLs in the district, but no more; the district's Office of Special Education Services reports that the "percentage of secondary school students with disabilities also identified as English Language Learners decreased from 31% to 16.8%." HOUS. INDEP. SCH. DIST., SPECIAL EDUCATION UPDATES 2012–2013, at 24 (2013), *available at* <http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/Domain/15681/Parent%20Resources/Special%20Education%20Updates%20PowerPoint.pdf>. Though the report does not attempt to explain this change, the district's stated goal of "ensure[ing] that LEP [Limited English Proficient] Special Education students who qualify are exited from LEP status using the 'alternative' state approved criteria" suggests that the change is due in some part to reclassifying special education students as non-ELLs. HOUS. INDEP. SCH. DIST. BD. OF EDUC., DISTRICT IMPROVEMENT PLAN FOR 2012–2013, at 79 (2012), *available at* <http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/Domain/7908/District%20Improvement%20Plan%202012-2013.pdf>.

interventions” for ELLs that “consider extrinsic factors such as poor attendance, lack of appropriate instruction, unfamiliarity with the English language, environmental and economic issues, and cultural differences, prior to determining eligibility for special education.”¹⁶⁸

San Diego USD also explicitly provides for translation services for IEP meetings and special education documentation, which includes a Translations/Interpretations Department as well as translators at seven school locations throughout the district.¹⁶⁹

Two districts take particular note of ELLs in special education. Texas’ Austin ISD has a Spanish/English Bilingual Special Education Program, and its special education ARD committee (equivalent to an IEP committee) works with a “language proficiency assessment committee” to determine what language is appropriate for instruction.¹⁷⁰ San Francisco USD’s English Learners Program Guide specifically addresses ELLs in special education, noting that the eligibility assessment must “include experts in non-biased assessments and provide the IEP team with information to help the team understand the impact of the student’s disability as it relates to an English Learner.”¹⁷¹ These kinds of procedures help districts properly identify the kinds of special education services ELLs should receive. Other districts should consider how they can effectively tie together their special education and ELL educational services.

168. ANGELA GAVIRIA & TIMOTHY TIPTON, CEP-EL: A COMPREHENSIVE EVALUATION PROCESS FOR ENGLISH LEARNERS: A PROCESS MANUAL 2 (2012), available at <http://www.sandi.net/cms/lib/CA01001235/Centricity/Domain/155/relatedfiles/CEP-EL%20Manual.pdf>. The referral process was a response to a 2007 study finding that Latino English learners were 70% more likely to be identified for special education services than their Latino non-English learner peers. *Id.* at 2. This document is an excellent resource for any districts considering their own ELL special education referral process.

169. *Special Education Interpreters and Translators*, SAN DIEGO UNIFIED SCH. DISTRICT, <http://www.sandi.net/Page/46703> (last visited Dec. 18, 2013). The website lists twenty-three available languages.

170. AUSTIN INDEP. SCH. DIST., SPECIAL EDUCATION PARENT HANDBOOK: A GUIDE FOR FAMILIES OF CHILDREN IN AISD SPECIAL EDUCATION 2010—2011, at 13 (2010).

171. S.F. UNIFIED SCH. DIST., ENGLISH LEARNER PROGRAM GUIDE 28 (2013), available at http://www.sfusd.edu/en/assets/sfusd-staff/enroll/files/2013-14/2013-14_english_learner_guide_en.pdf. The IEP teams are supposed to “consult with at least one certified staff person in CLAD [Cross-cultural Language and Academic Development] or [Bilingual] CLAD who can assist the IEP team in determining what Special Education services are necessary to provide the EL student with access to core curriculum instruction.” *Id.*

IV. APPLYING THE IDEA TO ENGLISH LANGUAGE LEARNERS

A. Lessons Learned

What can we learn from this survey? For one thing, although each of these districts are operating under the same basic federal framework, the procedures and structures put in place to satisfy that mandate can vary dramatically. Even with a relatively straightforward requirement like mediation, the three states take very different routes. California's Department of Education, for instance, contracts with a separate administrative agency to mediate its disputes, while Texas supplies mediators through its state education agency, and New York contracts its mediations out to community organizations through the New York State Dispute Resolution Association. California allows attorneys at post-filing mediations, but not pre-filing ones, while New York and Texas allow attorneys at all mediations.

Nonetheless, it appears that all districts surveyed satisfy at least the minimum requirements of the IDEA, and some have gone well beyond those requirements. Many districts are well aware of the dangers of disproportionate representation. Additionally, most of the districts surveyed have created parent outreach groups, though the extent to which these groups focus on language-minorities is unclear. And while districts' language-minority outreach is most often in Spanish, several districts with significant groups of other language-minorities provide information in those groups' native tongues as well.

So, although further research must be done to compare the effectiveness of these various approaches, we are left cautiously optimistic. But this survey cannot capture all of the factors that could affect the ability of language-minorities to enforce their rights under the IDEA. Indeed, there can be no one-size-fits-all solution when dealing with language-minority groups. This final Part begins exploring how we might begin to build awareness of the needs of language-minority families in local IDEA practices.

B. A Tale of Two Populations: Somali and Latino

Again, there can be no one-size-fits-all solution. Each urban area will need to tailor its special education services to a unique mix of ELLs. Columbus, Ohio, for example, has prominent Somali and Latino communities. For the 2012–13 school year, Columbus City

Schools reported a Limited English Proficient population of 5792 students, almost 12% of all students.¹⁷² While it does not provide a breakdown of its ELL students by language spoken, its overall Hispanic student population is 3976 (8%); its multiracial population is 2557 (5%); and its black population is 28,386 (57%).¹⁷³ In 2007, an outside group, Community Research Partners, estimated that Columbus schools enrolled 1312 Somali-speaking (though not necessarily ELL) students.¹⁷⁴

While many of the Latino and Somali parents' concerns may be quite similar, some of the issues these families face can be quite different. Many Latino students have some familiarity with English before starting school, even if they are classified as ELLs.¹⁷⁵ More than half of Latino students speak English at home, yet may not have access to high-quality early childhood education or may lack the opportunity to interact with native English speakers.¹⁷⁶ Parents and school-aged children who have come to the United States from Mexico may expect formal schooling that relies on essay-based (rather than standardized) testing, self-contained classrooms (rather than switching by period), and direct and explicit instruction.¹⁷⁷ Somali immigrants to the United States have a range of education levels, from those who have lived in refugee camps for many years with little access to formal education, to a professional class that often has been educated in Europe.¹⁷⁸ The Somali population in Columbus, however, is largely made up of farmers from southern Somalia who were forced to flee their homes by civil war, a group that tends to be less educated than the more professional population found in Minneapolis—the American city with the largest Somali

172. The District reported 5792 LEP students and 43,702 non-LEP students, an ELL population of 11.7%. *Reports Home*, OHIO.GOV, <http://bireports.education.ohio.gov/PublicDW/asp/Main.aspx?server=edumstrisp02&project=ReportCard&evt=3002&uid=guestILRC&pwd=&persist-mode=8> (last visited Dec. 18, 2013) (Columbus City code 043802).

173. *Id.*

174. CMTY. RESEARCH PARTNERS, *supra* note 17, at 6.

175. See DAVID CAMPOS ET AL., REACHING OUT TO LATINO FAMILIES OF ENGLISH LANGUAGE LEARNERS 3 (2011).

176. *Id.*

177. *Id.* at 22–23.

178. “It is true,” Rutledge writes, “that they all speak Somali and are Sunni Muslims, but within that cultural framework, they had a wide range of economic, educational and even religious experiences.” RUTLEDGE & ROBLE, *supra* note 17, at 8; see also CMTY. RESEARCH PARTNERS, *supra* note 17, at 1.

population.¹⁷⁹ School-age Somali refugees from this group thus may need special education services to deal with trauma-related mental health issues they suffer as a result of their experiences in Somalia.¹⁸⁰

These two groups present different challenges for a school system. Some students may start kindergarten having grown up in the United States speaking a language other than English at home. Such is the case for many ELLs, because the vast majority of ELLs in the United States were born here.¹⁸¹ Other ELLs, however, may have had little opportunity for any formal schooling.¹⁸² School districts should contemplate both of these populations when designing outreach and dispute resolution procedures.

Further, cultural differences between language-minority groups may dramatically affect how the members respond to outreach efforts or to the dispute resolution procedures themselves. Some groups may be more willing than others to seek help when official resources are lacking.¹⁸³ Other groups may fall prey to a culture of fear, leaving members worried that any engagement with a governmental body will lead to an investigation of families for undocumented persons living

179. RUTLEDGE & ROBLE, *supra* note 17, at 18, 95–102.

180. See, e.g., Deborah L. Scuglik & Renato D. Alarcon, *Growing Up Whole: Somali Children and Adolescents in America*, *PSYCHIATRY*, Aug. 2005, at 20, 21, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000212> (“As a result of past and present stressors, many Somalis report experiencing a symptom triad of depression, anxiety, and post-traumatic stress disorder (PTSD) . . .”).

181. See *supra* note 16 and accompanying text.

182. See RUTLEDGE & ROBLE, *supra* note 17, at 95. In contrast to that of Columbus, the Somali community of Minneapolis is much better established and more organized, and has even helped create a series of (charter) schools to educate Somali immigrant children from kindergarten through high school. *Id.* at 136. Scuglik and Alarcon point out that being placed in school grade level based on chronological age causes frustration and a sense of failure that “can lead to feelings of low self-esteem and hopelessness for many of these students.” Scuglik & Alarcon, *supra* note 180, at 24.

183. A common complaint is that parents are not involved enough in their children’s education. One author observes, “Unfortunately, not many parents take part in their child’s school activities . . . Sometimes, parents merely give the school the power to place the child in a classroom without regard to its appropriateness.” BARRY W. BIRNBAUM, *ENGLISH LANGUAGE LEARNERS WITH DISABILITIES: A RESOURCE GUIDE FOR EDUCATORS* 34 (2008). The Austin ISD Special Education Parent Handbook urges parents to “Read it. Ask questions about it. Use it. Spill kool-aid on it . . . Carry it and know that in doing so you are being the parent your child deserves and the partner the school needs.” AUSTIN INDEP. SCH. DIST., *supra* note 170, at 4. As Ruth Colker puts it, “The case law reflects that middle-class and wealthy parents can sometimes hire lawyers to get tuition reimbursement at expensive private schools; poor parents must represent themselves . . .” COLKER, *supra* note 60, at 172.

in a household.¹⁸⁴ Differences in cultural practices may make parties appear unfriendly or resistant to dispute resolution processes. For example, many Somalis consider eye contact to be aggressive and arrogant, so Somali parents might not look school staff or third-party mediators/facilitators in the eye during a session.¹⁸⁵ Religious restrictions could make many Somalis, particularly women, uncomfortable shaking hands.¹⁸⁶ Others characterize Somalis as operating with an “interpersonal intensity and passionate style [that] have been misinterpreted by teachers, employers, and peers as overly assertive and emotionally charged.”¹⁸⁷ Cultural differences may also lead parties to define their goals differently than schools or neutrals might expect. For instance, many Latinos place a high value on a community orientation as well as a desire for a sense of affiliation and honor, and thus may make decisions that appear to go against their personal interests.¹⁸⁸ Each of these cultural differences, if misunderstood, can make resolution more difficult.

Having dispute resolution providers of different racial, ethnic, and gender backgrounds may be an important part of mitigating these problems, but proper training and self-awareness on the part of all third-party neutrals is also necessary to minimize the impact of cultural differences and the implicit biases that can affect decision-makers. While most dispute resolution providers strive to be unbiased and impartial in their dealings with parties, they

184. See Thomas A. Doyle, *Competing Concerns in Employment Litigation: How Courts Are Managing Discovery of an Employee's Immigration Status*, 28 ABA J. LAB. & EMP. L. 405, 410 (2013); Udi Ofer, *Protecting Plyler: New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187, 210–11 (2012); María Pabón et al., *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama's H.B. 56 and other State Immigration Measures*, 6 FLA. INT'L U. L. REV. 231 (2011); see also *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: J. Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law and the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the Comm. on the Judiciary H.R.*, 111th Cong. 77 (2009), available at http://judiciary.house.gov/hearings/printers/111th/111-19_48439.pdf; Joint “Dear Colleague” Letter from U.S. Dep’t of Justice & U.S. Dep’t of Educ. (May 6, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.html>. Keep in mind that eighty percent of ELLs are U.S. citizens, and so it is parents’ and other family members’ status that may pose the biggest worry.

185. RUTLEDGE & ROBLE, *supra* note 17, at 96. Schools or third-party neutrals that do not take these cultural differences into account might perceive these parents as evasive or unfriendly, when they are only trying to be polite.

186. *Id.* at 97.

187. Scuglik & Alarcon, *supra* note 180, at 21.

188. See LaFree & Rack, *supra* note 124, at 790.

unknowingly make and respond to cultural dynamics, and must be trained to consciously acknowledge and address these dynamics.

C. Biases, Beliefs, and the Role of Dispute Resolution Providers

As discussed in Part II, both parents and schools value special education mediation for its ability to make parties feel like their voices have been heard.¹⁸⁹ Unfortunately, cultural dynamics may operate to diminish language-minority families' voices in schools. School personnel receive parents differently based on characteristics such as parents' vocabularies, their sense of entitlement to interact with teachers as equals, the amount of time they devote to school activities, and their transportation and child care arrangements.¹⁹⁰ These kinds of "cultural capital" are likely to be especially hard for language-minority families to acquire, which can lead school personnel to diminish the contributions of parents who are unable to interact as fluently or frequently.¹⁹¹ This makes it difficult for school personnel to fully acknowledge the contributions of these families when they are brought together to discuss a child's special education services.

Dispute resolution providers must work to overcome this lack of voice on the part of language-minority families and not fall prey to the implicit beliefs that diminish such families' contributions to their children's education. Maintaining neutrality can be one of the toughest jobs of dispute resolution providers, both because of the explicit actions of the parties during a session and because of implicit biases that people have in their interactions with others.¹⁹² For mediators, the Model Standards of Conduct call for impartiality, which the Standards define as, "freedom from favoritism, bias, or prejudice."¹⁹³ Yet, perhaps recognizing that it is easier for mediators to self-regulate actions than thoughts, the Standards elaborate that "[a] mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason."¹⁹⁴ Being aware

189. *See supra* Part II.C.2.

190. HARRY & KLINGNER, *supra* note 30, at 87.

191. *Id.* at 87-90.

192. *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71 (2010).

193. AM. ARBITRATION ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2005: STANDARD II. IMPARTIALITY (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf.

194. *Id.*

of these thoughts and beliefs is the harder part of training that dispute resolution instructors must address.

Dispute resolution instructors have turned to psychology to examine the role that implicit, unconscious biases might play in mediation.¹⁹⁵ Carol Izumi argues that mediators must first be aware of and acknowledge unconscious biases and then develop individual “implementation intention” goals and strategies to address those biases, e.g., “I intend to be fair and non-discriminatory.”¹⁹⁶ She also suggests that debriefing practices (journaling, group brown bags), in which mediators explicitly name and confront times when they have failed to live up to their egalitarian goals, might result in bias reduction.¹⁹⁷ Finally, exposure to other groups or positive images of those groups can reduce implicit bias, and Izumi suggests that more diverse trainers and trainees would help.¹⁹⁸ This last suggestion argues strongly in favor of recruiting more Latinos into the field of mediation and dispute resolution generally.

Dispute resolution providers must also be aware of the many points at which ELLs might be misidentified or mis-categorized for special education services.¹⁹⁹ These risks exist with any student, but may be more prominent for ELLs, who present more complex identification, evaluation, and categorization issues.²⁰⁰ As a threshold matter, evaluations ought to be done both in English and the student’s native language, yet often assessments are not performed in languages other than English.²⁰¹ Recent research in this area further suggests that curriculum-based assessments and dynamic assessments should be used with ELLs.²⁰² Curriculum-based assessments use classroom tasks to evaluate students and include samples of actual

195. See Izumi, *supra* note 192, at 154–55.

196. *Id.* at 144–45.

197. *Id.* at 148.

198. *Id.* at 148–49.

199. Another point worth considering is that disproportionality in classifications could be attributed to children’s opportunity to learn prior to referral for special education. Harry and Klingner argue that “[t]he referral process needs to include greater accountability for appropriate and adequate regular-education instruction prior to the decision to evaluate a child.” HARRY & KLINGNER, *supra* note 30, at 180.

200. See *generally* WHY DO ENGLISH LANGUAGE LEARNERS STRUGGLE WITH READING?: DISTINGUISHING LANGUAGE ACQUISITION FROM LEARNING DISABILITIES, *supra* note 30.

201. BIRNBAUM, *supra* note 183, at 42.

202. John L. Hoover & Laura Mendez-Berletta, *Considerations When Assessing ELLs for Special Education*, in WHY DO ENGLISH LANGUAGE LEARNERS STRUGGLE WITH READING?: DISTINGUISHING LANGUAGE ACQUISITION FROM LEARNING DISABILITIES, *supra* note 30, at 104.

student work in the area being assessed, as well as testing on standardized tasks, to help ensure reliability and validity.²⁰³ Dynamic assessments look at how students respond to instruction, so results are less dependent on students' previous opportunities to learn.²⁰⁴ While these types of assessments do not guarantee accurate classifications, they are more likely to result in culturally and linguistically appropriate special education evaluations.²⁰⁵ Mediators should make sure that all parties understand the types of assessments that were used on students. Relatedly, dispute resolution providers should explain to parents, through a translator if necessary, what to expect in the meeting and determine what information they have received from the schools.²⁰⁶ Knowing this information will help dispute resolution providers address any information gaps early on in the conversation.

Carol Izumi's observations about mediator training apply even more to special education dispute resolution procedures for ELLs, which involve parents who are likely language and racial/ethnic minorities. These parents may have little specialized knowledge about what their rights are under the IDEA and little access to the same wealth of legal information available to English speakers. Dispute resolution providers should be aware of these issues and attempt to proactively address their own potential biases. They should also be particularly aware of the need for competent translators and the provision of relevant background documents to parties in a language they understand. These steps will lead to more informed decision-making, a smoother dispute resolution process, and, ideally, improved and more satisfactory educational outcomes for ELLs with disabilities.

CONCLUSION

Dispute resolution professionals know that the relationship between minorities and dispute resolution procedures is a fraught one. Few large-scale empirical studies have looked at minorities' outcomes in particular dispute resolution procedures. Although these types of studies might prove expensive to administer, they would certainly improve the field's understanding of minorities' experiences in dispute resolution.

203. *Id.* at 104–05.

204. *Id.* at 105.

205. *Id.* at 108.

206. New York City, for instance, has its own phone interpreters. See *Over-the-Phone Interpretation Services*, N.Y.C. DEP'T EDUC., <http://schools.nyc.gov/Offices/Translation/PhoneInterpretationServices/Default.htm> (last visited Dec. 18, 2013).

Sharon Press recently concluded that there is still much to be done to improve the experience of minorities in court-connected mediation.²⁰⁷ She recommended evaluations that focus on satisfaction and the parties' relationships, in addition to settlement numbers; an increase in mediator diversity; mediator training that highlights diversity and cultural competence; and access to information by parties, including access in the appropriate language.²⁰⁸ Success in mediation is hard to measure, but providing a culturally competent process is an important first step. In part, getting cultural competency right is important because it is necessary to get parties to the table in the first place. Language-minority parents are not going to engage with the process (be it IEP facilitation, resolution meeting, or mediation) if it is clear that they won't have the access to information they need to make it worthwhile. In part cultural competency is important because getting it right will enhance the non-monetary benefits of mediation, the parties' enhanced sense of having been heard and the improved relationships that result.

Most of the data used in this Article was gathered online or from electronically available materials. Even where schools provide information about their ELL and Special Education practices on their web sites, it is impossible to tell how many parents actually access and use this information. Future studies should focus on how individual school districts reach out to specific language-minority populations within their areas. As discussed above, while the vast majority of ELL students in the United States are Spanish speaking, many urban areas have large and discrete pockets of other language speakers, such as the Somali population of Columbus, Ohio. While states and school districts can, and should, develop general approaches to dispute resolution for all special education students, they must take into account the unique cultural needs of their particular ELL populations.

Language-minority families with ELL students should seriously consider utilizing the IDEA if there is any chance that their children might be qualified for special education services. That does not mean that they should abandon other potential modes of bringing about changes in the education system. In addition to due process, the IDEA offers the ability to bring state complaints, and federal agencies can also step in to investigate systemic wrongdoing by schools. As the Los Angeles example shows, bringing lawsuits against

207. Sharon Press, *Court-Connected Mediation and Minorities: Has Any Progress Been Made?*, DISP. RESOL. MAG., Summer 2013, at 36, 39–40.

208. *Id.*

schools can lead to consent decrees that improve educational services to everyone. These methods are still available for language-minority families. However, for families who may have limited time and limited resources, improved local-level IDEA dispute resolution may be the more immediate way to achieve better education services.

The IDEA's dispute resolution provisions are not a panacea for the difficulties that ELLs face in our nation's public schools. Indeed, as discussed above, providing the right kind of special education to ELLs is no easy task. Even well trained special education instructors who know how to do particular interventions will need to understand the additional layers and specialized methodologies that need to be used with ELLs. Nor are increased access and more accurate, culturally-competent dispute resolution services likely to make up for the systemic problems that plague education in this country.²⁰⁹ But in many cases, the IDEA's dispute resolution procedures are the best opportunity for parents to actually improve their children's education in a timely manner.

A well-designed and well-run IDEA dispute resolution program is in everyone's best interest. The federal government has taken the first steps by requiring districts to make mediation available at any point in the process. States and local education agencies have continued the process by implementing innovative programs that go beyond the minimum federal requirements. This Article seeks to begin evaluating those policies and identifying best practices for all stakeholders. As scholars continue this work, and as the states continue to innovate, they should all keep children like Faith in mind, whose educational outcomes rely less on three-prong tests and impact litigation, and more on better communication between her family and school.

209. As Harry & Klingner put it, "many schools serving students from racially, ethnically, economically, and linguistically diverse neighborhoods have less qualified teachers, inadequate recourses, and high turnover among administrators." HARRY & KLINGNER, *supra* note 30, at 177.