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## Quality Education for America's Children with Disabilities: The Need to Protect Due Process Rights

Selene A. Almazan Esq.  
*UDC Law*, [selene@copaa.org](mailto:selene@copaa.org)

Andrew A. Feinstein Esq.  
[feinsteinandrew1950@gmail.com](mailto:feinsteinandrew1950@gmail.com)

Denise Stile Marshall M.S.  
[denise@copaa.org](mailto:denise@copaa.org)

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# Quality Education for America's Children with Disabilities:

## The Need to Protect Due Process Rights

*Council of Parent Attorneys and Advocates (COPAA)\*  
Selene A. Almazan, Esq. Andrew A. Feinstein, Esq. Denise Stile  
Marshall, M.S.*

### Introduction

Congress passed the Individuals with Disabilities Education Act (IDEA) “to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>1</sup> To guarantee that children with disabilities receive an appropriate education, Congress conferred on parents the right to be full partners with the school system in designing educational services for their children.<sup>2</sup>

That right to be a full partner is safeguarded by the right to file for an impartial due process hearing to enforce the law.<sup>3</sup> Parental partnership, as well as the right to initiate due process hearings, have worked to ensure that many children with disabilities have access to public education.<sup>4</sup> “The

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<sup>1</sup>20 U.S.C. § 1400(d)(1)(A) (2012).

<sup>2</sup>*Id.* at (d)(1)(B).

<sup>3</sup>*Quality Education for America's Children with Disabilities: The Need to Protect Due Process Rights*, COPAA: Council of Parent Attorneys and Advocates, available at <http://www.copaa.org/page/DueProcessRights>.

<sup>4</sup> *Id.*

paucity of actual due process hearings can be seen as an indicator of the overall success of this partnership.” Still, significant problems remain with the quality of special education, resistance to full inclusion of children with disabilities, and the lack of evidence that outcomes are improving. To hold school systems accountable for strong outcomes and inclusion, and to honor full partnership of parents, due process hearing rights must be maintained in the law.

Among the extensive procedural safeguards provided to parents at a due process hearing under IDEA are the right to be: accompanied and advised by counsel and individuals with special knowledge, or training with respect to the challenges children with disabilities exhibit; present evidence and confront, cross-examine, and compel the attendance of witnesses; bring a civil action once administrative remedies are exhausted; and receive an award of attorneys’ fees as part of the costs to the parent of the child with disabilities who is a prevailing party.<sup>5</sup> Though infrequently used, the right to a due process hearing remains a critical protection, as well as an important source of guidance for parents of students with disabilities and schools in understanding the IDEA.

Josh was a high school student with Tourette Syndrome, Obsessive Compulsive Disorder (OCD), and learning disabilities. Despite his serious struggles and his parents’ repeated requests for an individualized education program (IEP) under the IDEA, the school district refused to provide any accommodations or services. Josh’s difficulties in completing his assignments led him to stay up past midnight to complete homework, causing his anxiety to escalate and resulting in an explosion of both his physical tics and his OCD symptoms. Finally, his parents were driven to file for due process, resulting in a determination that Josh was eligible for special education services. The hearing officer ordered the district to provide Josh with an IEP and compensatory education. Josh went on to graduate from high school, graduate from college, and enroll in a Master’s program in environmental management.<sup>6</sup>

In 2013, the American Association of School Administrators (AASA) mounted an attack on the right to an impartial due process hearing

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<sup>5</sup>34 C.F.R. § 300.513; 514, 516 and 517 (2015).

<sup>6</sup>See Pam & Pete Wright, *Josh Won! Compensatory Education and an IEP*, available at <http://www.fetaweb.com/success/dp.comp.ed.koch.htm>; *In Re the Educational Assignment of J.K.*, No. 1825 (2007), available at <http://www.fetaweb.com/success/koch.appeal.pdf>.

and called for its abolition in part due to alleged rising instances.<sup>7</sup> In 2014, the Government Accounting Office (GAO) studied the issue and found that the frequency of special education hearings between parents and schools is actually low and declining.<sup>8</sup> The number of hearings has fallen from 7,000 in 2004-05 to 2,262 in the 2011-12 academic year, a tiny proportion of the 6.5 million children who qualify for special education services.<sup>9</sup> The steep decline was due, in large part, to the reduction in hearings in Puerto Rico, Washington, D.C., and New York.<sup>10</sup>

AASA and others continue to assert that due process hearings are a problem. This paper was written to rebut that assertion, and to highlight the profound importance of parental rights under IDEA. Additionally, the Council of Parent Attorneys and Advocates, Inc. (COPAA) proposes reforms to make the existing due process system fairer, more accessible, and more effective for protecting the rights of all children with disabilities.

## **Background: The Education of Children with Disabilities**

### SPECIAL EDUCATION PROMOTES LONG-TERM SOCIETAL INTERESTS

In enacting the Education for All Handicapped Children Act of 1975 (EAHCA), later renamed as the IDEA, Congress “sought to end the long history of segregation and exclusion of children with disabilities from the American public-school system.”<sup>11</sup> The IDEA states:

[D]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent

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<sup>7</sup>Sasha Pudelski, American Association of School Administrators, *Rethinking Special Education Due Process* (2013).

<sup>8</sup>U.S. Government Accountability Office, Publication No. GAO 14-390, *Special Education: Improved Performance Measures Could Enhance Oversight of Dispute Resolution* (2014).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup>Nat'l Council On Disability, *Back to School on Civil Rights*, at 25(2000), available at <http://www.ncd.gov/>

rawmedia\_repository/7bfb3c01\_5c95\_4d33\_94b7\_b80171d0b1bc.pdf.

living, and economic self-sufficiency for individuals with disabilities.<sup>12</sup>

When the IDEA works as Congress intended, the results are transformative for students with disabilities. As a result of receiving an appropriate education, millions of students are able to graduate high school, access further education and employment, contribute to this country's economic growth, and live independent and productive lives.<sup>13</sup> But, without a direct mechanism to enforce it, the IDEA cannot work:

LeDerick was a child who believed he did not have much of a future.<sup>14</sup> He struggled so much that he had to repeat first grade. In third grade, he was evaluated for a suspected disability and found eligible to receive special education services under the IDEA. The special education and related services that LeDerick received enabled him to make progress academically, and after graduation he enrolled in a community college where he thrived. He went on to graduate from New Jersey City University with honors, earning a Bachelor's degree in mathematics with a minor in fine arts. LeDerick is now an advocate, spoken word poet, playwright, and motivational speaker. He has performed at the White House and to professional audiences; and, LeDerick has presented to groups ranging from youth and staff at correctional facilities to college students.<sup>15</sup>

Because each child's needs are unique, educational programming, services, and accommodations under the IDEA are focused on the specific child.<sup>16</sup> Individualized educational programs (IEPs) ensure that the needs of each child with a disability will be met so that the child will grow into an adult who can live and work as independently as possible, thus lowering long-term costs to society. Educating children with disabilities increases the likelihood that they will contribute to society and reduces the

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<sup>12</sup>20 U.S.C. § 1400(c)(1).

<sup>13</sup> *Quality Education for America's Children with Disabilities: The Need to Protect Due Process Rights*, COPAA: Council of Parent Attorneys and Advocates, available at <http://www.copaa.org/page/DueProcessRights>.

<sup>14</sup> LeDerick Horne, Keynote Address, *Council of Parent Attorneys and Advocates Conference*, Baltimore, Maryland (March 7, 2014), available at <http://www.lederick.com/>.

<sup>15</sup> *Id.*

<sup>16</sup> See *Bd. of Educ. v. Rowley*, 476 U.S. 176, 205-206 (1982).

likelihood that society will need to support, institutionalize, or even incarcerate them in the future.<sup>17</sup>

#### PROCEDURAL SAFEGUARDS ARE IMPORTANT

The IDEA sets forth a system of “procedural safeguards” to protect the rights of children with disabilities to receive a free appropriate public education. These protections include the parents’ right to examine educational records, participate in meetings, obtain an independent educational evaluation, and resolve disputes through mediation or an impartial due process hearing.<sup>18</sup> These protections ensure that the requirements of the IDEA will be followed and increase the likelihood that the purposes of the IDEA will be met.<sup>19</sup>

The IDEA encourages a collaborative process through which parents and school districts work together to develop an IEP for children with disabilities.<sup>20</sup> Recognizing that a collaborative process would not always produce a consensus, and that school officials may have a natural advantage, Congress included protections to ensure the full participation of parents and the fair and impartial resolution of disagreements.<sup>21</sup> The Supreme Court has said:

[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process... as it did upon the measurement of the resulting IEP against a substantive standard.<sup>22</sup>

The imbalance of power between parents and school districts is stark.<sup>23</sup> Parents are not on equal footing with school districts in terms of resources, knowledge of the law, or access to information.<sup>24</sup> Parents are

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<sup>17</sup> *Id.* at 192. There must be “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 203.

<sup>18</sup> 20 U.S.C. § 1415(b)(1).

<sup>19</sup> See H.R. Rep. No. 105-95 at 105 (1997). (“The procedural safeguards in the IDEA have historically provided the foundation for ensuring access to a free appropriate public education for children with disabilities”).

<sup>20</sup> See 20 U.S.C. § 1414(d) (2006).

<sup>21</sup> *Sch. Comm. of Burlington v. Dep’t. of Educ.*, 471 U.S. 359, 368 (1985).

<sup>22</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982).

<sup>23</sup> See Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT’L ASS’N L. JUD. 423, 432-33(2012).

<sup>24</sup> See *Burlington*, 471 U.S. at 368-69. The Supreme Court acknowledged that in any dispute, school officials have a natural advantage over parents. And, more recently, the

outnumbered when sitting around the table discussing their child's needs – often a lone parent faces a room full of school officials.<sup>25</sup> School districts have access to tax-funded experts and attorneys, whereas, parents do not. Furthermore, schools have direct access to what is happening with the child in school and control how information is recorded and disseminated.

IDEA's procedural safeguards ensure that its substantive protections are real. These safeguards enable parents to be meaningfully involved in their child's education and to ensure that the school district is providing their child with an appropriate education. The law gives children with disabilities certain rights. It is the procedural safeguards including the individual enforcement mechanisms exercised by the parents which can make the promise of a free appropriate public education in the least restrictive environment a reality.<sup>26</sup> Due Process is an effective way to ensure that students with disabilities are educated.

The availability of a due process hearing is an important element in promoting compromise and cooperative resolution of disputes. Sometimes after participating in IEP team meetings that fail to address their child's individual needs, parents seek necessary services and support by filing a request for due process.<sup>27</sup> In the 2004 reauthorization of the IDEA, Congress reiterated, "[t]he due process procedures in IDEA are the only recourse parents have if they believe a school is not providing the services and support their child needs in order to learn."<sup>28</sup> An impartial due process hearing provides a powerful incentive to comply with the IDEA.

While Katie was at an Early Childhood Center, her parents made it clear to school officials that when she reached kindergarten they wanted her to attend her neighborhood elementary school and be educated with neighborhood children. Katie's parents were disappointed when, during the meeting to discuss Katie's transition to Kindergarten, school officials said that Katie should be placed in a segregated classroom at a "special school" more than ten miles from their home. Katie's parents retained an attorney from a nonprofit agency, and the district reluctantly agreed to place Katie in her neighborhood school for

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Supreme Court has said, "School districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them." *Schaffer v. Weast*, 546 U.S. 49, 60 (2005).

<sup>25</sup>See Chopp, *supra* at 6, note 13.

<sup>26</sup>See *Rowley*, 458 U.S. at 203, 205-06. See also note 27.

<sup>27</sup>*School Committee of the Town of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985).

<sup>28</sup>H.R. Rep. No. 108-77 at 379 (2003).

kindergarten. Following kindergarten and first grade, the school system again tried to move Katie to a “special school.” The family was forced to file for due process. The matter settled at mediation, and Katie successfully remained at her neighborhood school through 5<sup>th</sup> grade. When Katie transitioned to middle school, the district AGAIN tried to place her in a segregated classroom. Katie’s family was again forced to file for a due process hearing. This time the issues were not resolved prior to a hearing. Katie’s parents prevailed at the hearing. The district took the issue to federal court, resulting in more delay and cost for both sides. While in federal court, Katie’s parents and the district reached a settlement that has led to Katie’s current successful program in her neighborhood high school.<sup>29</sup>

A due process hearing is the only opportunity parents and students have to tell their story to a neutral decision-maker.<sup>30</sup> Prior to a due process hearing, meetings take place on school property where school officials preside over the meetings and have the final say on educational decisions related to the child.<sup>31</sup> Without the right to a due process hearing, school districts would be largely left to self-police their actions, and many parents would be unable to meaningfully participate in their child’s education. The U.S. and State Departments of Education lack both the incentive and the resources to enforce the IDEA for reasons discussed below.

Due process hearings are exceedingly rare.<sup>32</sup> For every 1,000 students in special education in the United States in 2011, only 2.6 due process hearings were requested. Likewise, only 34 for every 100,000 students proceeded to a full hearing and final decision. The majority of cases in the due process system settle without a hearing, because the student gets what he or she needs as a result of the case being filed.<sup>33</sup> In many cases, parents and school officials who are not able to reach an agreement at the IEP table. Ultimately, they do so after a request for a due process hearing has been filed.<sup>34</sup> Therefore, such a filing often becomes

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<sup>29</sup>Client of COPAA member; name has been changed to protect anonymity.

<sup>30</sup>*Id.*

<sup>31</sup>While the law is clear that parents have the right to participate in the development of their child’s program, ultimately it is the school district that proposes a program. The parent’s remedy is to seek a due process hearing.

<sup>32</sup>See *infra* Part IV.B.

<sup>33</sup>See Dick Zeller, *Six Year State and National Summaries of Dispute Resolution Data 30*, Center for Appropriate Dispute Resolution in Special Education (CADRE)(2012), <http://www.directionservice.org/cadre/pdf/National%20Part%20B%20Tables%2004-05%20thru%2009-10%20Summary%201March%202012.pdf>.

<sup>34</sup>See *Sch. Comm. of Burlington*, 471 U.S. at 369.



the catalyst for a resolution. Without the specter of an independent hearing officer compelling the school district to provide needed services, many districts have little or no incentive to provide such services, and would thus would be unwilling to consider providing needed services.<sup>35</sup>

State	Rate of Due Process Cases Filed Per 1,000 Special Education Students	Rate of Fully Adjudicated Due Process Hearings Per 1,000 Special Education Students	Due Process Hearings as Percentage of All Disputes
District of Columbia	80.17	21.30	94.30%
Puerto Rico	13.68	6.81	70.70%
New York	13.57	1.54	92.69%
Virgin Islands	6.07	0.76	72.73%
Hawaii	5.33	0.96	82.03%
California	4.52	0.17	43.08%
Massachusetts	3.50	0.11	27.49%
New Jersey	3.45	0.18	47.59%
Pennsylvania	2.84	0.22	56.58%
Connecticut	2.78	0.23	30.12%
National Average	2.60	0.34	54.58%

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Dennis was failing most of his classes year after year, yet the district determined he did not qualify for special education. It was not until a Legal Aid attorney filed for a due process hearing when Dennis was 18 years old that anything changed. In Dennis' case, the filing of the due process complaint was the catalyst for a resolution. The settlement agreement, which enabled Dennis

<sup>35</sup>See Mark C. Weber, *In Defense of IDEA Due Process*, 29 Ohio St. J. on Disp. Resol. 495, 516-517, 520 (2014).

<sup>36</sup>Joseph B. Tulman, et al., *Are there Too Many Due Process Cases? An examination of Jurisdictions with Relatively High Rates of Special Education Hearings*, 18 U.D.C.L. Rev. 249, 267 (2015).

to learn to read and to learn a trade, led to gainful employment after graduation. Due process protections enabled Dennis to have educational success as well as function independently in our society as an employed adult.<sup>37</sup>

Relying on state or federal courts to enforce the IDEA, as AASA proposes, is a poor alternative. The expense of filing a lawsuit in court is drastically greater than the expense of an administrative hearing, and is prohibitive for most families as well as an unnecessary diversion of limited resources for school districts.<sup>38</sup> One study reveals that the average case litigated in state or federal court is at least eight times more expensive than a due process hearing.<sup>39</sup>

#### DUE PROCESS RIGHTS ARE CONSTITUTIONALLY REQUIRED.

During the 2004 reauthorization of IDEA, Senator Jeff Bingaman (D-NM) told his colleagues, “[t]he due process and procedural safeguard provisions are the most important means of protecting the constitutional rights of children with disabilities to a free appropriate public education. [The IDEA] maintains these vital civil rights protections.”<sup>40</sup> Numerous court decisions make clear that the right to a due process hearing is constitutionally required.

Two landmark cases in the early 1970’s, *Pennsylvania Assn. for Retarded Children v. Commonwealth of Pennsylvania (PARC)*<sup>41</sup> and *Mills v. Board of Education of District of Columbia* established the constitutional right of access to an education for children with disabilities.<sup>42</sup> Relying on the Fifth and Fourteenth Amendment guarantees of due process, the courts in *PARC* and *Mills* effectively mandated a hearing prior to depriving a child of access to an education.<sup>43</sup>

The EAHCA (later renamed the IDEA) codified the rulings in *PARC* and *Mills*. In enacting the IDEA, Congress focused on two related constitutional rights: the right of equal access to education under the Equal

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<sup>37</sup>Client of COPAA member; name has been changed to protect anonymity.

<sup>38</sup>See Jay G. Chambers, et al., *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000*, CSEF, (2003), <http://csef.air.org/publications/seep/national/Procedural%20Safeguards.pdf>.

<sup>39</sup>See *Sch. Comm. of Burlington*, 471 U.S. at 369. (Study estimates approximately \$8,000-\$12,000 was spent on the average mediation or due process case in the year studied, but \$94,600 was spent on litigation in court in the same one-year period).

<sup>40</sup>150 Cong. Rec. S11653, 11659 (2004) (statement of Sen. Bingaman).

<sup>41</sup>*Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

<sup>42</sup>*Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

<sup>43</sup>*Id.* at 875 (“Due process of law requires a hearing prior to exclusion”); see also *PARC*, 343 F. Supp. at 293-295 (“[D]ue process requires a hearing before... children [with disabilities] may be denied a public education”).

Protection Clause and the right to a due process hearing if that access is denied under the Due Process Clause.<sup>44</sup> The legislative history of the IDEA states, “[school districts] are required by the Constitution of the United States . . . to provide a publicly-supported education for these ‘exceptional’ children.”<sup>45</sup> “Their failure to fulfill this clear duty...and their failure to afford them due process hearings...cannot be excused by the claim that there are insufficient funds.”<sup>46</sup>

In enacting the IDEA, Congress declared its intent to, “provide assistance to the States in carrying out their responsibilities under... the Constitution of the United States to provide equal protection of the laws.”<sup>47</sup> Congress emphasized the States’ “primary responsibility to uphold the Constitution of the United States...as well as the Congress’ own responsibility under the 14th Amendment to assure equal protection of the law.”<sup>48</sup> Both Congress and the Supreme Court have emphasized the constitutional underpinnings and mandates of the IDEA.<sup>49</sup>

The IDEA sets forth specific timelines for administrative due process hearings, which require that a final decision be issued in less than seventy-five days.<sup>50</sup> In state and federal court, by contrast, litigation typically spans multiple years.<sup>51</sup> A denial of a free and appropriate public education for a period of years pending, the resolution of litigation in federal or state court, would deprive parents of an opportunity to be heard at a meaningful time and in a meaningful manner, and would amount to a deprivation of the child’s constitutional rights.

#### DUE PROCESS UNDER ATTACK

In 2013, the AASA published a lengthy and glossy document calling for the abolition of the due process hearing system in special education.<sup>52</sup> Weber (2014) writes in defense of due process, stating:

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<sup>44</sup>S. Rep No. 94-168, at 6, 1975 U.S.C.C.A.N. 1425, 1429-36, quoting *Mills* at 876 (emphasis added).

<sup>45</sup>*Mills*, 348 F. Supp. at 876.

<sup>46</sup>S. Rep 94-168 at 22-23.

<sup>47</sup>*Id.* at 13.

<sup>48</sup>*Id.* at 22.

<sup>49</sup>*See id.* *See also Rowley*, 458 U.S. at 192-94.

<sup>50</sup>*See* 34 C.F.R. § 300.515 (2012) (a decision in a due process hearing must be issued no later than 45 days after the expiration of the 30 day resolution period).

<sup>51</sup>According to the Federal Court Management Statistics, the median length of time between filing and a trial in federal court is over two years. This statistic does not include length of time to issue a decision or subsequent appeals, which would be longer. *See United States Courts, United States District Courts- National Judicial Caseload Profile (2013)*, <http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-december-2013.pdf#page=1>.

<sup>52</sup>*See* Pudelski, *supra* at 7, note 7.

Due Process hearing rights under the Individuals with Disabilities Education Act are under attack. A major professional group and several academic commentators charge that the hearings system advantages middle class parents, that it is expensive, that it is futile, and that it is unmanageable. Some critics would abandon individual rights to a hearing and review in favor of bureaucratic enforcement or administrative mechanisms that do not include the right to an individual hearing before a neutral decision-maker. This Article defends the right to a due process hearing. It contends that some criticisms of hearing rights are simply erroneous, and that others are overstated.<sup>53</sup>

We agree with Weber and seek with this document to refute six claims made in the AASA document, which we discuss below.

#### *Academic Performance*

The AASA paper claims there is no evidence that due process hearings lead to improvements in the academic performance of students.<sup>54</sup> This contention confuses the issue, as it is evident that a disability can pose a serious challenge to learning and to demonstrating knowledge and abilities fully. It is equally understood and demonstrated in peer-reviewed research that accommodations can help students overcome or minimize the barriers presented by their disabilities—which is why federal law requires their use when necessary.<sup>55</sup>

Higher expectations for students with disabilities can lead to their increased participation in the curriculum when they are supported appropriately with individualized accommodations and improved instruction; this in turn can lead to higher academic performance.<sup>56</sup> Finally, research shows us that when all students (including those with the most extensive needs) are learning together and are given appropriate instruction and support, greater numbers of students can: participate, learn, and excel within grade-level general education curriculum, build

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<sup>53</sup>See Mark C. Weber, *In Defense of IDEA Due Process*, Ohio State Journal on Dispute Resolution, 29 Ohio St. J. 516-17 (2014).

<sup>54</sup>Pudelski, *supra* at 7, note 7.

<sup>55</sup>See <http://www.parentcenterhub.org/repository/assessment-accommodations/>.

<sup>56</sup>Ysseldyke J. Nelson, et al., *What We Know and Need to Know About the Consequences of High-stakes Testing for Students with Disabilities*, Exceptional Children J., 71(1), 75-95 (2004).

meaningful social relationships, achieve positive behavioral outcomes, and graduate from high school, college, and beyond.<sup>57</sup>

Disagreements about placement, methodology, provision of services, supports, and accommodations form the basis of many hearing requests.<sup>58</sup> There is no question that, in most cases, whether parents prevail at due process hearings or settle with the school district, the filing of a due process request results in significantly enhanced services for the student.<sup>59</sup> Combining these propositions, which are beyond dispute, makes it clear that the use of due process leads to major improvements in educational outcomes for students with disabilities.<sup>60</sup>

### *Statistics: The Incidence of Due Process Hearings*

The AASA document asserts that the number of due process hearing requests continues to increase.<sup>61</sup> This is factually untrue. In 2012, approximately 6.5 million children were identified as needing special education services by states under the IDEA.<sup>62</sup> The most recent data available from the National Center on Dispute Resolution in Special Education (CADRE) shows that 2,329 due process hearings were held in 2009-10.<sup>63</sup>

That represents approximately .04% of children who qualify for services under the IDEA, meaning that a tiny percentage of families

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<sup>57</sup>See Swift Schools, available at

<http://www.swiftschools.org/Common/Cms/Documents/ResearchSupport-final.pdf>.

<sup>58</sup>See Weber, *supra*. (citing studies which show parental win rates in due process hearings: an Illinois study revealed a 50.4% success rate for parents represented by an attorney; an Iowa study showed a 32% success rate for parents; a study of hearings in 41 states showed a 30.4% success rate for parents).

<sup>59</sup>*Id.*

<sup>60</sup>See, e.g., Scruggs, et al., *Do Special Education Interventions Improve Learning Of Secondary Content? A Meta-Analysis*, 31 REMEDIAL & SPECIAL EDUCATION, 437-449 (2009) (finding that the educational interventions studied are effective in helping children with disabilities learn); Berkeley, et al., *Reading Comprehension Instruction for Students with Learning Disabilities, 1995-2006: A Meta-Analysis*, 31 REMEDIAL & SPECIAL EDUCATION, 423-436 (2010) (finding that reading comprehension interventions are effective for skill development).

<sup>61</sup>Pudelski, *supra* note 7, at 23.

<sup>62</sup>NAT'L CTR. EDUC. STAT, TABLE 204.70: NUMBER AND PERCENTAGE OF CHILDREN SERVED UNDER INDIVIDUALS WITH DISABILITIES EDUCATION ACT, PART B, BY AGE GROUP AND STATE OR JURISDICTION: SELECTED YEARS, 1990-91 THROUGH 2011-12, DIGEST OF EDUCATION STATISTICS (2013), available at [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_204.70.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_204.70.asp).

<sup>63</sup>Zeller, *supra* at 30, n.19. See also U.S. GEN. ACCOUNTING OFFICE (GAO), GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS (2003), available at <http://www.gao.gov/new.items/d03897.pdf> (in 2003, the Government Accountability Office (GAO) found that .05% of eligible students used the due process hearing system in a given year).

participate in due process hearings in any given year; consequently, the incidence of due process hearings has dropped sharply over the past decade.<sup>64</sup> Most states have few due process hearings per year in relation to the number of students in the state receiving special education, and some states have none.<sup>65</sup>

Due process hearing requests have declined by 18% between 2004 and 2010. The number of fully adjudicated due process hearings has declined by 68% between 2004 and 2010.<sup>66</sup> The actual number of hearings has decreased from 1.5 hearings per 10,000 special education students in 2004-05 to 0.7 hearings per 10,000 students in 2011-12.<sup>67</sup>

The percentage of due process complaints resolved without a hearing has grown from 54% to 70% over six years.<sup>68</sup> Consistently, in both 2003 and 2014, GAO studies found that “numbers of formal disputes are generally low and states are using mediation and other strategies to resolve conflicts.”<sup>69</sup> In short, the AASA claim of a large and growing number of special education due process cases is belied by government data.<sup>70</sup>

### Cost

The AASA 2013 paper cites the financial costs associated with due process hearings as a reason to strip parents of their due process rights, and cites to an unpublished college honors project in support of this assertion.<sup>71</sup> However, a study funded by the U.S. Department of Education repudiates this argument.<sup>72</sup> According to the Special Education Expenditure Project

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<sup>64</sup>See Center for Appropriate Dispute Resolution in Special Education (CADRE), *IDEA Dispute Resolution Data Summary for: U.S. and Outlying Areas 2003-05 to 2014-15* (2015), available at <http://www.cadreworks.org/sites/default/files/2014-15%20DR%20Data%20Summary%20U.S.%20%26%20Outlying%20Areas.pdf> (the number of due process hearings held declined 58% between 2005 and 2012).

<sup>65</sup>See Zeller *supra* at 30, note 19. A few states and territories are outliers in having a higher number of due process hearings requested, including New York, District of Columbia (DC), and Puerto Rico. Even in these locations, the number of hearings is still remarkably low in relation to the total number of students with disabilities. *See id.*

<sup>66</sup>Zeller, *supra* at ii, note 29.

<sup>67</sup>U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 14-390, SPECIAL EDUCATION: IMPROVED PERFORMANCE MEASURES COULD ENHANCE OVERSIGHT OF DISPUTE RESOLUTION (2014) available at <http://www.gao.gov/assets/670/665434.pdf>.

<sup>68</sup>See Center for Appropriate Dispute Resolution in Special Education (CADRE), *Trends in Dispute Resolution under the Individuals with Disabilities act (2016)*, available at <http://www.cadreworks.org/sites/default/files/resources/TrendsInDisputeResolutionundertheIDEAOCT16.pdf>

<sup>69</sup>See GAO, *supra* at 12, nn. 27 & 28.

<sup>70</sup>*Id.*

<sup>71</sup>Pudelski, *supra* at 15, note 7.

<sup>72</sup>See JAY G. CHAMBERS, ET AL., CTR. FOR SPECIAL EDUC. FIN., REPORT 4: WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL

(SEEP) report, school districts spend three-tenths of one percent (0.3%) of total special education expenditures on mediation, due process, and litigation.<sup>73</sup> Since this statistic lumps together due process expenditures with mediation and litigation expenditures, due process expenditures alone would be even lower. The study also reports that the total expenditure for due process and mediation breaks down to \$15.00 per special education student per year.<sup>74</sup>

Society receives a great return on investment from special education, as noted above in section II.A. If, as the SEEP report states, the cost of enforcement works out to \$3.00 for every \$1,000 spent, it is a tremendous bargain.<sup>75</sup> The cost of enforcement of other government programs runs far higher. Moreover, the possibility of a due process filing encourages school districts to comply with the law for all students.<sup>76</sup>

Again, the AASA claim of high costs from due process is disproved by the available official data.<sup>77</sup> Indeed, private enforcement of special education rights appears to be a highly cost-effective way to enforce a beneficial governmental program.

### *Stress, Hostility, and Dissatisfaction*

The AASA document cites the stressful nature of due process hearings as another reason to abolish due process rights.<sup>78</sup> Here, the authors of the AASA report may be confusing the chicken and the egg. It is the stress that comes from watching their child languish in an inappropriate educational program that drives parents to file for due process.<sup>79</sup> The due process hearing is thus a manifestation of pre-existing hostility, not a cause of such hostility.<sup>80</sup>

Of course, litigation is stressful for both sides. Stress, however, is not an argument for the abolition of a constitutionally-protected right.

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EDUCATION, 1999-2000 at 5, note 32 (2003), available at

<http://csef.air.org/publications/seep/national/Procedural%20Safeguards.pdf>.

<sup>73</sup>See JAY G. CHAMBERS, ET AL., CTR. FOR SPECIAL EDUC. FIN., REPORT 4: WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000(2003), available at

<http://csef.air.org/publications/seep/national/Procedural%20Safeguards.pdf>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup>Weber, *supra*, 521-22 (adversary procedures are needed—and widely provided—in any number of situations where citizens are dissatisfied with determinations that government actors make concerning essential entitlements for individuals and families).

<sup>77</sup> *Id.*

<sup>78</sup>Pudelski, *supra* note 7.

<sup>79</sup>Meghan M. Burke & Samantha E. Goldman, *Identifying the Associated Factors of Mediation and Due Process in Families of Students with Autism Spectrum Disorder*, J. Autism Dev. Disorder, (2014).

<sup>80</sup> *Id.*

Eliminating the right to a due process hearing will not make parents less angry that their children are receiving an inappropriate education. Further, many conflicts lead to positive changes in school policy, procedure, or individual staff actions that result in reduced conflict and increased collaboration in future situations.<sup>81</sup> In addition, the vast majority of hearing requests are resolved through mediation, a forum that provides a setting for airing differences and cooperatively resolving problems, which has the potential to actually reduce tension and promote future cooperation.

### *No Child Left Behind (NCLB) Reporting and Monitoring*

The AASA document asserts that due process hearings are no longer necessary because district compliance is driven much more by the new reporting and monitoring requirements of No Child Left Behind (NCLB) and IDEA 2004 than by due process hearings.<sup>82</sup> This argument is a newer variant of the argument that enforcement should come from the U.S. and State Departments of Education, not from individual parents.<sup>83</sup>

The problem with this argument is that neither the U.S. Department of Education nor the departments of education of the various states have the incentives or the resources to effectively enforce the mandates of the IDEA.<sup>84</sup> State departments of education are integral to the governance of local boards of education to improve education for all students.<sup>85</sup> The roles of a state department of education according to the National Association of State Boards of Education (NASBE) are policy-maker, advocate, and liaison and consensus builder. Absent from the NASBE list of roles is regulatory enforcer.<sup>86</sup> The power of a state department of education is in using policy making authority and convening power to persuade a local school board to devote resources to initiatives like the Common Core or reversing trends.<sup>87</sup> Exceptions to the typical roles of a State Departments

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<sup>81</sup>Weber, *supra* at 522 (“The development of a body of precedent at the administrative level is another important benefit of having due process hearing rights. Precedents are established either locally or more broadly when due process cases are adjudicated and appealed”).

<sup>82</sup>Pudelski, *supra* note 7.

<sup>83</sup>NAT’L COUNCIL ON DISABILITY, *Back to School on Civil Rights*, 2000 at 219, available at [http://www.ncd.gov/rawmedia\\_repository/7bfb3c015c954d3394b7b80171d0b1bc.pdf](http://www.ncd.gov/rawmedia_repository/7bfb3c015c954d3394b7b80171d0b1bc.pdf).

<sup>84</sup>See Mark C. Weber, All Areas of Suspected Disability, 59 LOY. L. REV. 289, 319–21 (2013) (collecting and discussing sources on budgetary pressures on school districts under current economic conditions).

<sup>85</sup>National Association of State Boards of Education <http://www.nasbe.org/about-us/state-boards-of-education/> (last visited Jan. 27, 2017).

<sup>86</sup>*Id.*

<sup>87</sup>Frederick M. Hess & Frederick J. Brigham, How Federal Special Education Law Affects Schooling in Virginia, in RETHINKING SPECIAL EDUCATION 161–63 (Chester E. Finn et al. eds. 2001).



of Education are the requirements under the IDEA to monitor, provide technical assistance, and enforce the IDEA.<sup>88</sup> The U.S. Department of Education has recently restructured systemic monitoring efforts in an attempt to focus more on student outcomes using a complex matrix of indicators focused on systemic data rather than individual cases.<sup>89</sup>

The NCLB was a reauthorized version of the Elementary and Secondary Education Act (ESEA).<sup>90</sup> As such, NCLB/ESEA addresses programmatic aid, standards, and goals. ESEA provides no specific rights or protections for individual children and is not a vehicle to ensure that an individual student with a disability is receiving appropriate educational services.<sup>91</sup> The current Administration has attempted to augment educational quality through the Race to the Top, which ties federal funds to certain policy changes sought of the states.<sup>92</sup> Nothing in ESEA or the Race to the Top deals with the right of an individual student to receive an appropriate education.

IDEA is the primary mechanism under which eligible students receive individualized services designed to ensure a child with a disability and their family has access to a free and appropriate public education that improves educational results.<sup>93</sup> A National Council on Disability (NCD) study reports, “The findings indicate that the failure to ensure compliance with IDEA is widespread and persists over time.”<sup>94</sup> NCD found that “federal efforts to enforce the law over several Administrations have been inconsistent, ineffective, and lacking any real teeth.”<sup>95</sup> In reauthorizing IDEA 2004, Congress noted, “Often the only way a school district’s lack of compliance is discovered is when a parent pursues litigation.”<sup>96</sup>

The IDEA provides, in addition to the right to pursue due process, the availability of a state complaint mechanism. In 2011, 5,025 such complaints were filed nationwide, of which 3,223 resulted in written reports.<sup>97</sup> The state complaint mechanism is useful for clear violations of

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<sup>88</sup>34 C.F.R. § 300.604(a)(1),(3) and (b)(2)(i),(2)(v)..

<sup>89</sup>SEA Monitoring Systems: Entering the Age of Results Driven Accountability (2015), Center for Technical Assistance for Excellence in Special Education 1. [http://www.taese.org/cms/images/\\_utahstate\\_media/documents/SEAmongsysfin2015122bj.pdf](http://www.taese.org/cms/images/_utahstate_media/documents/SEAmongsysfin2015122bj.pdf)

<sup>90</sup>NO CHILD LEFT BEHIND ACT OF 2001, 107 P.L. 110, 115 Stat. 1425.

<sup>91</sup>*Id.*

<sup>92</sup>Patrick McGuinn, *Stimulating Reform*, Vol 26, Issue 1, 136 (2011).

<sup>93</sup>*See Rowley* at 189-90.

<sup>94</sup>Nat’l Counsel On Disability, *Back to School on Civil Rights*, at 219 (2000), available at [http://www.ncd.gov/rawmedia\\_repository/7bfb3c01\\_5c95\\_4d33\\_94b7\\_b80171d0b1bc.pdf](http://www.ncd.gov/rawmedia_repository/7bfb3c01_5c95_4d33_94b7_b80171d0b1bc.pdf).

<sup>95</sup>*Id.*

<sup>96</sup>H.R. Rep. No. 108-77 at 380 (2003).

<sup>97</sup>Zeller *supra*. note 34.

the law and for when a school district fails to provide the services enumerated in the child's IEP. Furthermore, the state complaint mechanism reduces the cost and time a parent would need to expend on due process filings.<sup>98</sup> Still, the state complaint mechanism does not, and probably cannot, deal with questions of whether the IEP offered by the school district provides the student with a free appropriate public education in the least restrictive environment. The due process system is the only method whereby a parent can secure an answer to concerns about whether their child's IEP complies with the legal requirement of providing the student with a free appropriate public education.<sup>99</sup>

### *Disproportionate Benefit to Wealthy Families*

The AASA 2013 paper criticizes the IDEA for disproportionately benefitting wealthy families.<sup>100</sup> Due process complaints cost money to pursue, and families of lesser means often cannot pursue this path. There exists a need to make due process protections more accessible to all, not less.<sup>101</sup> A high percentage of children with disabilities live below the poverty line.<sup>102</sup> The solution for the disparity in access to representation is to improve access for all families, rather than reducing access for everyone.

Three legal rulings have disproportionately impacted low-income families, curbing access to their IDEA rights and protections: *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, *Schaffer v. Weast*, and *Arlington Central School District v. Murphy*.<sup>103</sup>

### Attorneys' Fees for Cases that Settle

The Supreme Court's decision in *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), made it much

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<sup>98</sup>Sue Swenson & Melody Musgove, *Use of Due Process Procedures After A Parent Has Filed A State Complaint* (2015).

<sup>99</sup>Weber, *supra* at 522.

<sup>100</sup>Sasha Pudelski, *Rethinking Special Education Due Process* (2016).

<sup>101</sup>See SYMPOSIUM: KEEPING THE NEEDS OF STUDENTS WITH DISABILITIES ON THE AGENDA: CURRENT ISSUES IN SPECIAL EDUCATION ADVOCACY: HOW IDEA FAILS FAMILIES WITHOUT MEANS: CAUSES AND CORRECTIONS FROM THE FRONTLINES OF SPECIAL EDUCATION LAWYERING, 20 Am. U.J. Gender Soc. Pol'y & L. 107, 110 (2011).

<sup>102</sup>*Id.* at 112.

<sup>103</sup>*Id.* at 142.

harder for middle class families to pursue a due process action.<sup>104</sup> Prior to the Buckhannon decision, parents could recover their attorneys' fees against the school district where the filing of the due process action catalyzed the result they sought. Buckhannon rejected the catalyst theory and if attorneys' fees were only available, where the parents prevailed on the merits through a fully adjudicated hearing.<sup>105</sup> Since 87% of due process cases are resolved before being fully adjudicated, the availability of fee reimbursement has been substantially reduced; more and more middle class families are economically prevented from vindicating the rights of their children.<sup>106</sup>

#### Burden of Proof in Due Process Hearings

In *Schaffer v. West*, the Supreme Court held, absent a specific state law to the contrary, that the party seeking relief (which are parents in more than 90% of all cases filed) bears the burden of proof in a due process hearing.<sup>107</sup> Due process cases are generally about whether the school district proposed an IEP that provides the student with a free, appropriate public education in the least restrictive environment.<sup>108</sup> Because the school staff proposed the IEP based on their own analysis of the strengths and needs of the student, it makes sense that the school district should have to demonstrate the appropriateness of what it proposed. To overcome this burden, parents are compelled to devote considerable resources to seek all relevant information from the school, to analyzing that information to determine appropriateness, and to retaining experts to opine on the appropriateness of the program offered.<sup>109</sup> These added costs shut many moderate and low-income families out of the process.

#### Right to Reimbursement for Expert Witness Fees

In *Arlington Central School District v. Murphy*, the Supreme Court held that the IDEA does not create a right to reimbursement for expert witness fees incurred as part of the due process proceedings, regardless of the outcome of the hearing.<sup>110</sup> In doing so, the Supreme Court removed a right available to prevailing plaintiffs in Americans with Disabilities Act, Title VII, and other civil rights matters.<sup>111</sup> Securing experts is essential to

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<sup>104</sup>Leonard Braman, *After Buckhannon: Attorney's Fees and Children's Civil Rights Under the IDEA*, at 3 (2005).

<sup>105</sup>*Id.* at 142.

<sup>106</sup>Zeller, *supra*.

<sup>107</sup>*Schaffer v. West*, 546 U.S. 49 (2005).

<sup>108</sup>Zeller at 118.

<sup>109</sup>*Id.* at 127.

<sup>110</sup>*Arlington Central School District v. Murphy*, 548 U.S. 291 (2006).

<sup>111</sup>Zeller at 141-142.

prevailing in a due process hearing and can be very expensive.<sup>112</sup> Once again, the Supreme Court acted in a way to ensure that only the wealthiest families can utilize the due process mechanism.

We agree with the AASA argument that the due process mechanism is disproportionately available to the wealthy. The need for access by poor and middle-income families has been noted before.<sup>113</sup> Concern with the inequity is not a reason to abolish the due process system of protections. Expanding access to pro bono or prepaid attorneys, through initiatives to recruit, train, and fund pro bono attorneys, would also equalize access to the IDEA's protections.<sup>114</sup> The solution to the problem of inequality is not to cut off the vital protection that due process affords. The solution is to level the playing field so that all parents can vindicate the right of their child to a free appropriate public education.

Taken as a whole, the AASA position paper is a dangerous attack on the rights of students and their parents under the IDEA and ultimately an attack on the viability of the IDEA itself. Absent affordable access to a neutral review mechanism, there will be no checks and balances in the system. Absent the due process mechanism, the IDEA's promise of a free, appropriate public education to students with disabilities will vanish.

#### HOW DUE PROCESS PROTECTS STUDENTS' RIGHTS: THREE EXAMPLES

##### *Least Restrictive Environment*

Isabel, a student with multiple disabilities and significant social and emotional needs, was making progress in a regular classroom with supplementary services and a Behavior Intervention Plan.<sup>115</sup> Upon moving to a new state, the new school district placed her in a segregated special education classroom, despite her parents' requests for more integration. Additionally, school personnel used physical force, restraint, and prolonged periods of isolation and seclusion to address her behavioral issues in violation of her IEP and Behavior Intervention Plan. Isabel was later diagnosed with Post Traumatic Stress Disorder as a result of this experience. IEP meetings and discussions

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<sup>112</sup>*Id.*

<sup>113</sup>See Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois 1997-2002* (2002), available at <http://dueprocessillinois.org/Access.pdf>, See also Weber, Mark C. Weber, In Defense of IDEA Due Process, *Ohio State Journal on Dispute Resolution*, 516-17 (2014).

<sup>114</sup>Hyman, et al., *supra* note 94, at 145.

<sup>115</sup>*Waukeee Cmty. Sch. Dist. v. Douglas L.*, No. 4:07-cv-00278-REL-CFB, 2008 U.S. Dist. LEXIS 124146 (S.D. Iowa Aug. 7, 2008).

between the parents and school failed to resolve the issues, and Isabel's parents filed for a due process hearing. A hearing officer found that the school district violated the IDEA by failing to provide Isabel with an education in the least restrictive environment and by implementing behavioral interventions which were inconsistent with substantive and procedural rights under the IDEA.<sup>116</sup>

The least restrictive environment (LRE) mandate of the IDEA requires that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled."<sup>117</sup> Not only is this legally required, but research over the past thirty years consistently shows that students with and without disabilities learn best in inclusion settings.<sup>118</sup> Students with disabilities show dramatically-improved academic performance when included with appropriate support in the general education classroom.<sup>119</sup> Additionally, students without disabilities show improved academic performance in inclusive education classrooms.<sup>120</sup> Studies also show significant social and emotional benefits for students both with and without disabilities.<sup>121</sup>

There are still many school districts that are out of compliance with the LRE mandate of the IDEA.<sup>122</sup> The right to a due process hearing allows parents to challenge segregated education and discriminatory exclusionary practices when they occur. Without the right to challenge placement

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<sup>116</sup>*Id.*

<sup>117</sup>20 U.S.C. § 1412(5)(A) (2006).

<sup>118</sup>See TASH, INCLUSIVE EDUCATION AND IMPLICATIONS FOR POLICY: THE STATE OF THE ART AND THE PROMISE, July 9, 2009, at 8; Hunt, *et al.*, *Evaluating the effects of placement of students with severe disabilities in general education versus special classes*, JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, 19(3), 200-214 (1994); McDonnell, *et al.*, *Academic engaged time of students with low-incidence disabilities in general education classes*, AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, 35(1), 18-26 (1997); Mary Fisher & Luanna Meyer, *Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs*, 27 RESEARCH & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 165, 166, 169-73 (2002).

<sup>119</sup>See TASH, *supra* note 116; see also ROBERTA WEINER, IMPACT ON SCHOOLS, 42, Capital Publications (1985) ((in 50 research studies since the 1980's comparing the academic performance of integrated and segregated students with mild disabilities, the mean academic growth of the integrated group was in the 80th percentile, while that of the segregated students was in the 50th percentile).

<sup>120</sup>See TASH *supra* note 116.

<sup>121</sup>*Id.* at 9.

<sup>122</sup>See NAT'L COUNCIL ON DISABILITY, *supra* note 94, at 95-97; see TASH, *supra* note 116, at 4-5.

decisions in a hearing, students are left with no defense against segregated learning and exclusion from their neighborhood schools.<sup>123</sup>

### *Eligibility*

In order to receive special education and related services under the IDEA, a child must be classified as a “child with a disability” as defined under the IDEA.<sup>124</sup> According to the U.S. Department of Education, many children have hidden disabilities that are not properly diagnosed.<sup>125</sup> The consequences of failing to identify an eligible child under the IDEA are serious. A child who is determined not to be eligible receives no special education, may not receive accommodations, and may be deprived of the related services the child needs to learn.<sup>126</sup> Parents can use the due process system to challenge the district’s determination that their child is not eligible for services:

George was an eight-year-old child with autism who was taught in an alternative setting because he could not be managed in a general education classroom.<sup>127</sup> However, George was not receiving special education services because his school district asserted that he was “not disabled enough” to qualify for special education. His parents filed for due process and the hearing officer found that George was eligible for special education. As a result, he was provided with supports and services that would allow him to benefit from his education. Not only did this success at due process improve educational outcomes for

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<sup>123</sup>See TASH, *supra* note 116; Hunt, *supra* note 116.

<sup>124</sup>See 20 U.S.C. § 1401(3)(2006). Under the 2008 Amendments to the Americans with Disabilities Act, the definition of disability was expanded. “The definition of disability... shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” 42 U.S.C. § 12102(4). This expanded definition of disability should also be binding on schools.

<sup>125</sup>U.S. Dep’t of Educ. Office for Civil Rights, *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973* (2005), <http://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html> (“For example, a student with an undiagnosed hearing impairment may be unable to understand much of what a teacher says; a student with a learning disability may be unable to process oral or written information routinely; or a student with an emotional problem may be unable to concentrate in a regular classroom setting. As a result, these students, regardless of their intelligence, will be unable to fully demonstrate their ability or attain educational benefits equal to that of non-handicapped students. They may be perceived by teachers and fellow students as slow, lazy, or as discipline problems”).

<sup>126</sup>U.S. Dep’t. of Educ, Office for Civil Rights, *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973* (2005), <http://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>.

<sup>127</sup>Client of COPAA member; name has been changed to protect anonymity.

George, but it also brought public attention to a systemic scandal in which children with disabilities were being kept out of special education.<sup>128</sup>

### *Transition Services*

Dennis was a high school student who had never learned to read. From first through eleventh grade, he failed the majority of his classes, yet he was promoted from grade to grade. By the time he was eighteen, he had a history of suspensions from school and juvenile charges against him. Despite his academic and behavioral problems, Dennis was never evaluated or identified as a child with a disability in need of special education. Believing that Dennis had an undiagnosed learning disability, an attorney from Legal Aid filed for a due process hearing on Dennis' behalf under the IDEA. A settlement was reached without a hearing. Under the settlement agreement, Dennis was provided with intensive educational and transition services. As a result, Dennis learned to read and graduated high school. Utilizing IDEA's transition services, Dennis attended a technical school paid for by the school district, where he excelled as a student electrician. He then secured a job as an apprentice to a traveling electrician. One of his first assignments was to travel to Texas after a hurricane to help rebuild homes.<sup>129</sup>

Dennis, like every American student, deserves an opportunity to graduate from high school with the knowledge and skills necessary to enable him to get a good job, live independently, and contribute to society. He certainly was not on that path, but because Dennis was eligible for, and received services under the IDEA, he was able to change course and succeed. The IDEA has changed Dennis' life and the lives of millions of eligible children with disabilities for the better.<sup>130</sup>

The IDEA mandates transition services in order to promote successful post-school employment or education.<sup>131</sup> Transition planning requires the IEP Team to look at the youth's academic, vocational, community participation, and activities of daily living skills.<sup>132</sup> Done properly, the IEP team should come up with a vision of how the youth can live and work as independently as possible when he or she ages out of the

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<sup>128</sup>*Id.*

<sup>129</sup>Client of COPAA member; name has been changed to protect anonymity.

<sup>130</sup>Client of COPAA member; name has been changed to protect anonymity.

<sup>131</sup>§ 1401(34) (2006).

<sup>132</sup>§ 1401 (34) (A).

school system and then design services and education to permit the youth to reach that goal of maximum independence. Districts often take a very narrow view of the scope of transition services. Many schools lack adequate staff and programs to provide meaningful transition services. Frequently, referrals are made to outside agencies that are unable to deliver the services needed.<sup>133</sup> Ironically, many students with disabilities with high academic abilities lack the life skills necessary to function in college or the work place, but are denied adequate transition services because they appear academically successful.<sup>134</sup> In a 2010 study of the intersection of the educational system and the juvenile justice system, the Civil Rights Project found that both systems fail to serve at risk youth.<sup>135</sup> As the example of Dennis shows, it is the due process system that permits students to get the transition services they deserve.

#### PROTECTING AND STRENGTHENING DUE PROCESS PROTECTIONS

As discussed above, due process protections are constitutionally required, essential to protecting students' rights, and necessary to carrying out the purposes of the IDEA.<sup>136</sup> COPAA members see firsthand that when the IDEA works as intended, the results for students with disabilities can be spectacular. Unfortunately, school districts sometimes fail to identify children with disabilities and to provide effective services to children determined eligible.<sup>137</sup> The due process mechanism exists to permit parents to compel school districts to do what the law requires them to do.

The AASA proposal to eliminate due process rights should be rejected. It is based on erroneous assumptions, faulty logic, and bad public policy. The due process system should be preserved and strengthened.<sup>138</sup> In doing so, it is appropriate to consider reforms to the due process system to assure that it is meeting its goals. The following principles should guide policy development:

- Each child with a disability is entitled to high-quality, individualized educational services and supports aimed at

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<sup>133</sup>§ 1401 (34) (C).

<sup>134</sup>U.S. Dep't. of Educ, Office for Civil Rights, *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973* (2005), <http://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>.

<sup>135</sup>Catherine Kim et al., *The School to Prison Pipeline*, NYU Press (2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/the-school-to-prison-pipeline>.

<sup>136</sup>Weber, *supra* note 53, at 503.

<sup>137</sup>U.S. Dep't. of Educ, Office for Civil Rights, *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973* (2005), <http://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>.

<sup>138</sup>See Weber, *supra* note 53; Archer, *supra* note 111; Hyman, *supra* note 101.



equipping the child with the skills, knowledge, and experience the child needs to live and work as independently as possible.

- The right to challenge a school system to provide children with disabilities with the services and supports they need is essential to ensure delivery of such services. Due process has been an effective and efficient way for parents to do so.
- Due Process must be affordable to all. Where parents challenge a school system and win change to benefit their children, the school system should pay for all the costs associated with that challenge.

Imperfections in the current due process system exist, however. COPAA recommends the following changes to make the system more just.

#### Restore the Right to Secure Attorneys' Fees when Filing a Due Process Action that Produced the Result Sought

The *Buckhannon* decision has made it much harder for middle and lower-income families to avail themselves of the due process system.<sup>139</sup> The result has been that school systems are able to provide fewer and less effective services with far less fear that they will be challenged for failing to provide.<sup>140</sup> Providing for the availability of fee reimbursement where an action results in the relief sought by the parent will ensure that all students can receive the education to which they are legally entitled.

#### *Place the Burden of Proof on the School District*

The decision in *Shaffer v. Weast* has resulted in placing the burden on parents to prove that the school failed to offer an IEP that would provide the student with a free appropriate public education.<sup>141</sup> This makes little logical sense, in that it is the school that proposed the IEP to meet its statutory obligations. It also increases costs for parents to challenge inappropriate programs.

#### *Restore the Right to Reimbursement for Expert Fees*

The *Murphy* decision substantially raised the cost of challenging the program offered by a school.<sup>142</sup> A parent cannot win a hearing without an expert. Expert testing, observation, report writing, and testifying can be very expensive. The law ought to be the same for special education cases

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<sup>139</sup>Braman at 3.

<sup>140</sup>Hyman, *supra* note 101, at 123.

<sup>141</sup>*Schaffer*, 546 U.S. 49.

<sup>142</sup>*Murphy*, 548 U.S. 291.

as for other civil rights cases: that is, if the plaintiff prevails, the cost of the expert is a cost to be assessed against the defendant.

#### *Require a School District Response to Due Process Complaints*

Currently, parents face a significant penalty for failing to plead an issue in a due process complaint.<sup>143</sup> School districts, however, face no penalty for failing to answer or respond to the specific issues in the complaint. Because parents typically have the burden of proof in due process hearings, a school district's failure to provide a detailed response to a due process complaint inhibits parents' ability to meet their burden.<sup>144</sup> When a school district fails to provide a response, parents have no remedy.<sup>145</sup> This inequality of obligations for parents and school districts significantly compromises any notion of fair play in due process. Rules regarding the content of initial submissions should be applied consistently to both parents and school districts to comport with notions of fundamental fairness. Requiring a detailed response to a due process complaint, even when the school district has previously supplied a form entitled Prior Written Notice, levels the playing field for parents and may facilitate early resolution in some cases.

#### *Require Equal Application of Evidentiary Rules*

Rules of evidence are not strictly enforced at due process hearings.<sup>146</sup> Rather, a more flexible standard is generally used, although the rules enforced vary widely from hearing officer to hearing officer. The rationale for a more flexible standard is to ensure that more evidence is allowed than may be allowed under the more formal rules of evidence.<sup>147</sup> Unfortunately, the lack of any evidentiary standards has led hearing officers to believe they can admit or exclude evidence without any justification.<sup>148</sup> The parties frequently have no idea what rules will be applied, often leading to unnecessarily extended hearings.<sup>149</sup> Congress should task the U.S. Department of Education with developing evidentiary standards by regulation to be applied uniformly.

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<sup>143</sup>*Id.*

<sup>144</sup>A handful of states place the burden of proving the appropriateness of a proposed IEP on the school district, including New Jersey, New York, Nevada, and Connecticut.

<sup>145</sup>Upon receiving a due process complaint, many school districts simply provide parents with a document titled, Prior Written Notice (PWN), yet the provision of PWN is no substitute for a detailed response to a complaint.

<sup>146</sup>Weber, *supra* note 53, at 520.

<sup>147</sup>*Id.*

<sup>148</sup>Perry Zirkel, *Impartial Hearings under the IDEA: Legal Issues and Answers*, The National Association of State Directors, January 2013, at 17-18.

<sup>149</sup>*See Id.*

*Establish a Statutory “Adverse Inference” Rule*

Currently, school districts control the drafting of the IEP.<sup>150</sup> At the same time, school districts often fail to provide parents with a complete set of the student’s educational records, something to which parents are entitled, and no penalty exists for school districts that withhold documents.<sup>151</sup> Indeed, some of the most valuable information comes in emails between school staff and in teachers’ logs, documents that school districts often refuse to disclose. To further the Congressional purpose of ensuring an appropriate education to all students with disabilities, the law should establish an “adverse inference” rule for due process hearings (such as the one that exists in other litigation settings.). Such a rule would state that a school district’s failure to provide documents, including Prior Written Notice (PWN), to parents warrants a finding that the documents would have supported the parents’ case. Such a rule would further level the playing field at the administrative hearing.

*Enforce the Requirement that School Districts Provide Prior Written Notice*

To participate meaningfully in the educational process, parents need access to information, including clear explanations of why a school district proposes or refuses to take an action related to their child’s education. To that end, the IDEA mandates that school districts provide PWN to parents whenever a local educational agency “proposes to initiate or change or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.”<sup>152</sup> All PWN’s must describe the action proposed or refused, explain the reasons for the decision, describe what information and documents the school district relied on to make the decision, and describe other options considered by the IEP team.<sup>153</sup> Commonly, school districts fail to provide PWN or provide a PWN that is inadequate and

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<sup>150</sup>20 U.S.C. § 1414(d)(1)(A) and (d)(6); 20 U.S.C. § 1414(d)(1)(B)-(d)(1)(D); 20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.320-322.

<sup>151</sup>The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. FERPA gives parents certain rights with respect to their children’s education records. 34 C.F.R. § 99.10-99.12. A parent or eligible student may file a written complaint with the Family Policy Compliance Office regarding an alleged violation under of FERPA. The complaint must be timely (submitted to the office within 180 days of the date that the complainant knew or reasonably knew of the violation) and state clearly and succinctly specific allegations of fact giving reasonable cause to believe that the school has violated FERPA.

<sup>152</sup>20 U.S.C. § 1415(b)(3) (2006).

<sup>153</sup>20 U.S.C. § 1415(c) (2006).

incomplete, which fails to explain the reason(s) behind a decision or to indicate what information the school district relied on to make the decision.<sup>154</sup> If parents are not fully informed of the reasoning behind a school district's action or inaction, they will not be equipped to make an informed decision for their child. Enforcement of the PWN requirements is needed to enable meaningful parental participation.

### *Eliminate Two-Tier Systems*

A handful of states have two-tier due process systems, which include two levels of administrative reviews. Only after both levels of administrative review have been exhausted can a party file an appeal in state or federal court.

The two-tier system forces parents to pay for legal representation and expert witness testimony at the first level.<sup>155</sup> Should the family prevail at the first level and the school district appeal, the family is forced to expend additional resources at the second level. Two-tier systems subject parents and children to significantly greater delays and expense, with no added benefit, and can lead to results that are fundamentally unfair.<sup>156</sup> Eliminating the second tier would create savings for the state, make due process hearings more affordable to parents, and restore more fairness to the process.

### *Encourage New Attorneys and Law School Clinics to Provide Legal Representation of Low-Income Families, and Increase Partnerships with Parent Training Centers, Legal Aid and Offices of Protection and Advocacy.*

Legal Aid offices and State Offices of Protection and Advocacy provide, to the extent they are capable, representation of low-income families in due process cases. The demand is so great, however, that they cannot provide services to more than a sliver of the eligible population.<sup>157</sup> "Provide Continuing Legal Education incentives to new attorneys to

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<sup>154</sup>*Id.*

<sup>155</sup>Weber, *supra* note 53, at 520.

<sup>156</sup>While evidence is presented to the trier of fact at the first tier, additional evidence is generally not presented to the second tier on appeal. The adjudicator at the second tier has not heard the evidence or weighed the credibility of witnesses. Then, if a party appeals the decision to federal court, a federal judge will review the decision of the second-tier judge who did not directly hear the evidence. For this reason, a two-tier system results in removing the ultimate decision-maker farther and farther away from the hearing and the evidence, which again compromises the fairness of the process.

<sup>157</sup>See Hyman, available at,

[http://help.workworldapp.com/wwwwebhelp/protection\\_and\\_advocacy\\_systems\\_overview.htm#Protection\\_and\\_Advocacy\\_Systems\\_Overview\\_System\\_Description](http://help.workworldapp.com/wwwwebhelp/protection_and_advocacy_systems_overview.htm#Protection_and_Advocacy_Systems_Overview_System_Description)

partner with legal aid and Protection & Advocacy”<sup>158</sup> attorneys as mentors to law students and new lawyers to meet the needs.

#### RESOLVING DISPUTES WITHOUT A HEARING

While the due process system needs to be sustained and strengthened, COPAA recommends several actions to reduce the need of parents to seek a hearing.

##### *Ensure Meaningful Parental Participation*

The IDEA states, “[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by...strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.”<sup>159</sup> When parents are permitted to meaningfully participate in the decision-making process as required by the IDEA, differences of opinion are more likely to be resolved at the IEP table.<sup>160</sup> When parents are given access to all the information they need to make an informed decision, their opinions are considered, and parents and school officials are able to engage in a constructive dialogue about the needs of the student, the likelihood of a dispute going to a due process hearing is reduced. Parental participation can be enhanced through the following steps:

##### Observation

To participate meaningfully and fully as team members and to exercise their due process rights effectively, parents must be able to observe their child’s education in progress, as well as proposed placements, accommodations, and services, either directly or by having an expert of their choice conduct the observation. Parents and their experts are frequently denied access or severely limited in their ability to observe their child in school or to observe another placement, which compromises

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<sup>158</sup>See Hyman, at 146,n. 207: “Under 42 U.S.C. § 15043, each state and territory is required to establish a “protection and advocacy” agency “of last resort” to advocate, at no cost, on behalf of the human rights of persons with intellectual, developmental, mental health, physical, sensory and other disabilities. § 15043. Most “P & As” have staff lawyers and/or lay advocates who represent students and parents in an array of special education matters ranging from IEP meetings to mediations and from due process hearings to court appeals and class action litigation.”

<sup>159</sup>20 U.S.C. § 1400(c)(5)(B) (2006).

<sup>160</sup>Marcia L. Rock, *Partners as Equal Partners: Balancing the Scales During IEP Development*, 32 TEACHING EXCEPTIONAL CHILDREN, 30-7 (2000).

their ability to participate fully in the development of their child's IEP.<sup>161</sup> This predicament is even more disturbing when their child has limited or no functional communication abilities. To ensure meaningful participation and to level the playing field, parents and their experts must have a right to meaningful observation in the classroom.

#### Parent Training

Parents can be at a distinct disadvantage in IEP meetings. It is vital that parents are trained and informed about their rights to have meaningful parental participation in IEP meetings. The emphasis on parental training and participation is found in the Comments to the 1999 Regulations: "Parents of children with disabilities are very important participants in the education process for their children. Helping them gain the skills that will enable them to help their children meet the goals and objectives of the IEP or IFSP will bring positive changes for parents, will assist in furthering the education of their children, and will aid the schools as it will create opportunities to build or reinforce relationships between each child's educational program and out-of-school learning."<sup>162</sup> Parent training opportunities should be expanded through an increased support for outreach by federally-funded training programs and by requiring school systems to enhance the provision of training and educational material to parents.

#### *Encourage Early Dispute Resolution.*

If parents are unable to meaningfully participate in the educational process, disputes over educational decisions are more likely to arise. As noted above, for disputes that are not resolved at the IEP table, the IDEA provides several avenues for dispute resolution that are less formal than a due process hearing. Parents may file a complaint with their state educational agency, resolve disputes in mediation, or reach an agreement in a resolution session.<sup>163</sup> Mediation can be a useful, less adversarial option for resolving disputes, and when effective, can eliminate the need for a due process hearing.<sup>164</sup> Although all parties benefit from the early resolution

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<sup>161</sup>Letter to Mamas, 42 IDELR 10 (OSEP 2004) (Parental participation is important, but "neither the [IDEA] statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement").

<sup>162</sup>64 Fed. Reg. 549 (1999).

<sup>163</sup>See 20 U.S.C. § 1415 (2006).

<sup>164</sup>See CADRE, *supra* note 19, at 13-24. (The National Center on Dispute Resolution in Special Education statistics show that mediations result in a high rate of agreements, significantly higher than the rate of agreements reached in resolution sessions).

of disputes, the current system contains structural barriers to early resolution.

THE FOLLOWING RECOMMENDATIONS ARE MADE TO OVERCOME THESE  
BARRIERS AND ENCOURAGE THE EARLY RESOLUTION OF DISPUTES

*Confidentiality in Resolution Sessions*

A barrier to the early resolution of disputes is the lack of confidentiality requirements for resolution sessions.<sup>165</sup> Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.<sup>166</sup> Discussions that occur during resolution sessions, however, are not protected by confidentiality requirements. The same rationale that supports the confidentiality of mediation – encouraging candid dialogue by disallowing statements to be used in subsequent litigation – applies to resolution sessions.<sup>167</sup> A confidentiality requirement for resolutions sessions would encourage the early resolution of disputes by promoting meaningful discussions and increasing the likelihood that an agreement will be reached.

*Attorneys' Fees for Mediation and Resolution Sessions*

After the Supreme Court's decision in *Buckhannon*, attorneys' fees became unavailable for parties who obtain relief through mediation or a resolution session.<sup>168</sup> Alternative dispute resolution procedures result in lower costs of litigation.<sup>169</sup> A right to attorneys' fees for parents who obtain settlements through mediation or resolution sessions would promote settlements and expand access to attorney services for families with limited income.

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<sup>165</sup>*Homer Central Sch. Dist.*, 106 LRP 65707 (SEA NY 10/27/06). (SRO affirms HO decision to admit discussions from a resolution meeting at a subsequent due process hearing. SRO concluded that discussions at a resolution meeting are not confidential as a matter of law.) See also, 71 Fed. Reg. 156 at 46704 (2006).

<sup>166</sup>20 U.S.C. § 1415 (e)(2)(G)(2006).

<sup>167</sup>See *Homer Central Sch. Dist.* at 168.

<sup>168</sup>*Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

<sup>169</sup>U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS (2003), available at <http://www.gao.gov/new.items/d03897.pdf>

## **Conclusion**

Eliminating the due process protections of the IDEA is inconsistent with the United States' commitment to equal access to education for individuals with disabilities. It also makes no economic sense. Providing a free, appropriate public education to students with disabilities results in citizens being able to participate in the economy, pay taxes, contribute to their communities, and avoid dependence on the government to meet their needs. Ultimately, the proposal to do away with due process protection would mean increased costs to taxpayers as well as reduced dignity to millions of Americans.

The due process system is essential to ensure that the civil and constitutional rights of children with disabilities will be protected, so that the promise of the IDEA can be fully realized and the country can benefit from the full inclusion of individuals with disabilities in the workforce and in society.



