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MEDIATION OF SPECIAL EDUCATION DISPUTES IN PENNSYLVANIA

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INTRODUCTION

Congress intended for mediation to be the most utilized form of dispute resolution under the Individuals with Disabilities Education Act (IDEA).[1] However, in Pennsylvania, lawyers are

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[1] *See* S. REP. NO. 105-17, at 26-27 (1997).

> It is the committee's strong preference that mediation become the norm for resolving disputes under IDEA. The committee believes that the availability of mediation will ensure that far fewer conflicts

forbidden from participating in special education mediation.[2] This Article explains that an attorney can be a parent's strongest asset in special education mediation,[3] and that the prohibition of counsel weakens parents' chance to have a fair and successful mediation.

The IDEA was enacted to ensure that the unique and diverse needs of children with disabilities are met by school districts.[4] Indeed, the frustrations with lack of adequate special education resources can lead students to drop out of school.[5] To ensure adequate educational services for children with special needs, the IDEA created various tools to assist children and their parents in navigating special education, including Individualized Education Program (IEP) meetings,[6] formal complaints,[7] due process hearings,[8] and mediation.[9] Mediation has become integral to fulfilling the directive of the IDEA to ensure that children with disabilities receive a free and appropriate public education (FAPE). The 2004 reauthorization of the IDEA required that state or local educational agencies provide an option for mediation even before the filing of any formal complaint.[10]

Pennsylvania's Office for Dispute Resolution (ODR) operates the mediation process in Pennsylvania.[11] Theoretically, mediation is available to all 260,000 IDEA-eligible children.[12]

> will proceed to the next procedural steps, formal due process and litigation, outcomes that the committee believes should be avoided when possible.

Id. Prior to 1997, the federal law did not require mediation. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 615(b)(5), (e), 111 Stat. 37, 88, 90-91 (1997).

[2] OFFICE FOR DISPUTE RESOLUTION, YOUR GUIDE TO MEDIATION 2 [hereinafter ODR MEDIATION GUIDE] *available at* http://odr-pa.org/wordpress/wp-content/uploads/medguide.pdf.

[3] *See* Andrea Shemberg, *Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?*, 12 OHIO ST. J. ON DISP. RESOL. 739, 754 (1997) (stating that resolving IDEA disputes using mediation would deprive parents of "their strongest asset—a knowledgeable attorney").

[4] *See* 20 U.S.C. § 1400(d) (2006). Under the IDEA, children with disabilities must be provided with "a free appropriate public education . . . designed to meet their unique needs and prepare them for further education, employment, and independent living." *Id*.

[5] *See* U.S. DEP'T OF EDUC., 2 ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 232 tbl.4-1 (2007) [hereinafter ANNUAL REPORT], *available at* http://www2.ed.gov/about/reports/annual/osep/2007/parts-b-c/29th-vol-2.pdf (providing specific numbers for each state on students receiving IDEA services who dropped out of school). In 2004-2005, 1,551 Pennsylvanian students ages fourteen to twenty-one served under the IDEA dropped out of school, totaling ten percent of Pennsylvania special education students. *Id*. This evidence suggests that failing to provide appropriate educational placement for students with disabilities puts these students at risk for higher unemployment and incarceration rates. *Id*. *See also* Sam Dillon, *Study Finds High Rate of Imprisonment Amongst Dropouts*, N.Y. TIMES, Oct. 9, 2009, at A12 (reporting on study that "estimated society could save $209,000 in prison and other costs for every potential dropout who could be helped to complete high school"); Gary Fields, *The High School Dropout's Economic Ripple Effect*, WALL ST. J., Oct. 21, 2008, at A13 (detailing public officials' concerns that dropout rates lead to lost tax revenue because of the reduced earning potential).

[6] *See* 20 U.S.C. § 1414(d)(1)(A)-(B) (2006). IEP meetings are discussions among the child's parents, teachers, and specialists evaluating the child's academic and functional performance, and they result in the creation of an Individual Education Program used to guide the child's education. *See id*.

[7] *See id*. § 1415(b)(3)(6).

[8] *See id*. § 1415(f).

[9] *See id*. § 1415(e).

[10] *See id*. § 1415(e)(1).

[11] In 2010-2011, ODR received just 472 requests for mediation and 277 of those requests were assigned to a

But, ODR specifically provides that in mediation "[a]ttorneys may not participate on behalf of either party."[13] This prohibition is not a properly promulgated regulation and is incongruous with established case law. In order to help children, Congress and the Supreme Court have afforded rights to parents of children with disabilities. The Supreme Court has held that parents have independent, enforceable rights under the IDEA that are intertwined with their child's entitlement to a free appropriate public education.[14] The Supreme Court emphasizes the united voice parents must have for themselves and their children. As parental rights are essential to the IDEA, it is wholly contrary to the spirit of the statute and accompanying case law that in Pennsylvania, mediation continues to be a forum that restricts parents' right to counsel. As Pennsylvania stands alone in wholly excluding lawyers from mediation,[15] it is ill-conceived that parents are given an ultimatum where they must forfeit their right to counsel or not be able to access mediation to resolve their child's educational programming. Consequently, Pennsylvania's ODR must strongly reconsider the exclusion of attorneys from mediation discussions, particularly because such exclusion falls most harshly on parents who are the least sophisticated.

This Article proceeds in four parts: first, it explores the power imbalance present when an attorney is prohibited from attending mediation. Second, this Article explains that attorney participation is essential for due process protection and how prohibition of such results is improper administrative rulemaking in Pennsylvania. Third, this Article rejects the unsubstantiated claim that having an attorney present in mediation creates an adversarial environment that is antithetical to effective mediation. Lastly, this Article argues for various proposals that could be adopted to seamlessly incorporate attorneys into the mediation process, providing parents with more equal bargaining power.

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mediator. The use of mediation in Pennsylvania varies. The highest number of requests came from Montgomery County, the second wealthiest county in the state. Philadelphia, the largest district in the state but ranked forty-fourth in per capita income, generated only twenty-seven requests for mediation. *See* OFFICE OF DISPUTE RESOLUTION, PA. DEP'T OF EDUC., ANNUAL REPORT 2010-2011 8 (2011) [hereinafter ODR REPORT], *available at* http://odr-pa.org/wordpress/wp-content/uploads/ODR-2010-2011-Annual-Report1.pdf; U.S. GOV'T CENSUS BUREAU, SUMMARY FILE 3, tbl.P82 (2000) (listing data showing that Montgomery County is ranked second wealthiest county in the state and Philadelphia is ranked forty-fourth in per capita income).

[12] BUREAU OF SPECIAL EDUC., PA. DEP'T OF EDUC., SPECIAL EDUCATION STATISTICAL SUMMARY 2009-2010 7 tbl.10 (2010) (providing a statewide total of 265,427 Pennsylvanian students ages six to twenty-one who received special education services from 2009 to 2010).

[13] ODR MEDIATION GUIDE, *supra* note 2, at 2.

[14] Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 533 (2007) ("IDEA grants parents independent, enforceable rights."); *see also* Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982) ("Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies.").

[15] Pennsylvania is one of two states that mandate an exclusion of attorneys—down from eight states in 2006. NANCY LEE JONES, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): MEDIATION PROVISIONS, RL31331, CRS REPORT FOR CONGRESS 9, 10 n.52 (2006) ("at least eight states formally exclude or discourage attorneys from participating in mediation."). Arkansas is the only other state that prohibits attorney participation. However, unlike Pennsylvania, Arkansas allows for parties to consult attorneys before accepting a settlement proposal. *See* ARK. DEP'T OF EDUC., SPECIAL EDUC. AND RELATED SERVS., 10.00 MEDIATION AND HEARINGS § 10.01.10.3(D) (2003), *available at* http://arkansased.org/about/pdf/current/ade_155_mediation_rule.pdf.

I. THE POWER IMBALANCE BETWEEN PARENTS AND SCHOOL DISTRICTS

Parents of children with disabilities have extensive interaction with school officials, special education teachers, and school district administrators. With the assistance of representatives from the school district, parents are expected to navigate the complexities of their children's special education services. Meeting with school officials and teachers can be an intimidating experience: the use of technical jargon during meetings, multiple assessments from different parties, and the multitude of placement options often leaves parents feeling overwhelmed and unlikely to question what they are told.[16] Communication difficulties are only exacerbated when parents come from disadvantaged backgrounds and do not have the resources to speak confidently about what they think is best for their child.[17] Parents, who are often poor or undereducated, may not even have Internet access to find online resources to build an adequate knowledge base to assist them in conversations with school officials.[18] Moreover, parents from any socio-economic background may lack the emotional wherewithal to speak to school officials about their child's needs.

The bargaining imbalance between parents and school districts exists as well in the mediation setting. Mediation is sought when an impasse has been reached regarding a child's special education opportunities. While heralded as a successful alternative to a due process hearing, the mediation process can exacerbate the power imbalance, which is often the underlying cause of the conflict.[19] Parents may not know how to navigate the informality of the mediation

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[16] *See, e.g.*, Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 52 (1997) (finding that school officials were more satisfied with settlement agreements when working with poorer parents, and concluding that "[w]ealthy parents may have asserted themselves more vigorously than poorer parents. School officials were less likely to have the upper hand in mediations with wealthy parents, so they may have perceived the mediation as less fair."); Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities under the IDEA*, 53 RUTGERS L. REV. 333, 351 (2001) (explaining that the process of forming an IEP often is not collaborative since parents often do not receive much advanced notice regarding IEP meetings, lack substantive knowledge regarding proposed placements, have difficulty understanding the school district's technical terms and can find it difficult to be "objective" since their children are involved).

[17] *See* Jonathan A. Beyer*, A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 53 (1999) ("Parents with children with disabilities often are poor, emotionally vulnerable, and undereducated."). The disproportionally of poor parents is related to the over-representation of minority children in special education. Since 1975, Congress has noted over-identification as a concern and proposed recommendations to correctly identify children. *See* 20 U.S.C. § 1400(c)(12) (2006) ("Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities. More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population."); s*ee also* COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC., MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 119 (Suzanne M. Donovan & Christopher T. Cross eds., 2002) (discussing the effect of poverty on cognitive ability as it related to special education classification and assessment).

[18] *See, e.g.*, NAT'L TELECOMM. AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, DIGITAL NATION: EXPANDING INTERNET USAGE 2 (Feb. 2011), *available at* http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf. ("Significant gaps in Internet usage still exist among certain demographic and geographic groups around the country. People with college degrees adopt broadband at almost triple the rate of those with some high school education (84% versus 30%), among adults 25 years and older.").

[19] *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1098-99 (2000) (arguing that the informality of the mediation process contributes to the power imbalance as compared to an adjudicatory proceeding).

process successfully, and in mediation they do not have the formal procedural safeguards that apply to due process hearings.[20] Mediation can strain the relationship between the parents and the school officials because many of the same problems present at the IEP meetings persist: doubts about their own level of knowledge and preparation, speaking to multiple people about their wishes for their child, and the use of confusing jargon. The concerns of parents who feel isolated and overwhelmed at mediation need to be addressed.

As Congress has made it clear that mediation is not to be used as a mechanism to deny or delay parental rights,[21] the lax procedural requirements and prohibition of counsel suggests that parental rights are in fact being denied. The use of mediation may result in unsuspecting parents accepting unfair settlements under the guise of compromise.[22] The power imbalance in mediation is a perverse side effect of Congress' championing the use of mediation in place of due process hearings. One way to correct this problem is to allow attorneys in mediation. The presence of an attorney accords parents with their due process right to counsel while acting as a preventive measure against unfair settlements.

II. CONSTITUTIONAL CONCERNS OVER THE PROHIBITION OF ATTORNEYS IN SPECIAL EDUCATION MEDIATION

Those who consider the constitutional protections that should be afforded to parties in mediation are alarmed by the prohibition of counsel. Amongst mediation professionals, the exclusion of attorneys in the mediation process is against recommendation.[23] There is also the concern that it denies parties' constitutional right to an attorney. Richard C. Reuben, a dispute-resolution scholar and mediator, analyzed the state-action doctrine and concluded that court mediation programs operated by state courts or administrative entities are state actors and thus procedural protections such as the right to an attorney must be afforded.[24]

Specifically, Reuben explains that "[w]hen a court delegates its authority to administer a dispute to private attorney-neutrals who serve on rosters at the court's pleasure, the court's essential constitutional obligations flow to the private neutral along with the delegation of authority to act on the court's behalf in the resolution of a dispute."[25] These constitutional

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[20] *See id*. (providing that rules and procedures in due process hearings structurally "balanc[e] the playing field").

[21] *See* 20 U.S.C. § 1415(e)(2)(A)(ii) (2006).

[22] *See, e.g*., Marchese, *supra* note 16, at 338 ("At worst, mediation may result in parents forgoing the formal procedural protections of the IDEA and accepting compromise without a full understanding of the ramifications of their decision.").

[23] *See* STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS §§ 10.2 cmt., 11.3 cmt. (1999), *available at* http://www.courtadr.org/files/NationalStandardsADR.pdf ("The Society of Professionals in Dispute Resolution opposes all efforts to exclude attorneys from mediation sessions where parties desire to have their lawyers present . . . [because they] may act as a crucial check against uninformed and pressured settlements . . . ."); UNIF. MEDIATION ACT § 10 cmt. (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003 finaldraft.pdf ("Some parties may prefer not to bring counsel. However, because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, *the Drafting Committees elected to let the parties*, not the mediator, *decide*.") (emphasis added); *see also* Roselle L. Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 FORDHAM URB. L.J. 419, 428 n.45 (2010) (noting that the presence of lawyers at mediation is recommended).

[24] Reuben, *supra* note 19, at 1096.

[25] *Id*. at 996.

obligations include the right to counsel inferred by the concept of Fifth Amendment due process guarantees given to civil litigants.[26] IDEA mediation squarely falls within the ambit of circumstances in which there is a constitutional right to representation by counsel. The recognition that the absence of counsel could result in due process violations and ultimately result in unfair prejudicial settlements, particularly for poorer parents, should be a wake-up call for those who support the prohibition of attorneys from mediation.

III. ODR'S IMPERMISSIBLE ADMINISTRATIVE RULEMAKING

In addition to the due process violations, Pennsylvania's prohibition of counsel was enacted and has been sustained through improper rulemaking. In promulgating the IDEA, Congress gave the states the choice to permit or prohibit attorneys.[27] However, this choice must be implemented through a properly promulgated rule.

Pennsylvania's provision that prohibits counsel from attending mediation is found solely in the Pennsylvania Office for Dispute Resolution's (ODR) "Your Guide to Mediation."[28] The General Counsel for ODR has stated that the mediation guide is "understood" to have input (and approval) from the Pennsylvania Department of Education, but because the state's rule prohibiting attorneys predates the IDEA's explicit requirement that state educational agencies establish procedures governing mediation, the origin of the provision is unclear.[29] This explanation is deficient and contrary to the proper implementation of administrative regulations.[30]

The case *Bethlehem Area School District v. Zhou*[31] is illustrative of the courts' treatment of ODR's policies and regulations. In *Zhou*, the mother of a gifted student requested that

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[26] *Id*. at 1079.

[27] *See* S. REP. NO. 105-17, at 26 (1997).

> The committee believes that, in States where mediation is not [sic] offered, mediation is proving successful both with and without the use of attorneys. Thus, the committee wishes to respect the individual State procedures with regard to attorney use in mediation, and therefore, neither requests nor prohibits the use of attorneys in mediation.

Id.

[28] While the guide prohibits attorney participation, it does not cite to any such administrative rule. *See* ODR MEDIATION GUIDE, *supra* note 2, at 2.

[29] Letter from Ed Titterton, General Counsel, Office of Dispute Resolution to Author (September 3, 2010) (on file with author).

[30] *See* 20 U.S.C. § 1415(a) (2006).

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

Id. *See id*. § 1415(b)(2)(5) (stipulating that mediation is a type of procedure that is governed by 20 U.S.C. § 1415(a) and explaining that any state educational agency or local educational agency must provide mediation). School districts are, by definition, local educational agencies. *See* 34 C.F.R. § 300.28(a) (2011) (defining "local educational agency" as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service for . . . schools in a . . . political subdivision of a State . . . ."). Absent any local school district prohibition of attorneys, attorneys should not be barred. ODR's provision appears to strip local educational agencies of their authority to have attorneys present in mediation.

[31] 976 A.2d 1284 (Pa. Commw. Ct. 2009).

transcripts from a due process hearing be translated into Mandarin Chinese.[32] After both ODR and the school district refused translation, Pennsylvania's second-tier Appeals Panel issued an order granting the mother's request in reliance on ODR's "Special Education Dispute Resolution Manual" which stated that parents were entitled to a transcript.[33] On appeal, the Pennsylvania Commonwealth Court completely rejected this argument. Specifically, the Commonwealth Court held that the ODR manual did not rise to the level of a properly promulgated Pennsylvania regulation and consequently did not have the force of law to compel the school district to provide the translated transcripts.[34] The court distinguished between a substantive rule and a general statement of policy and held that the ODR manual was not a substantive rule since it had

> not been listed as a Pennsylvania regulation subjected to the proper adoption and implementation procedures required of regulations in [the] Commonwealth. While it is inarguable that the Department is a Commonwealth agency enabled by the Administrative Agency Law to promulgate regulations, the ODR Manual, under the analysis excerpted above, cannot be read to have the force of law, but is, at best, a statement of ODR policy. As such, the Appeals Panel, relying solely on the policy statements contained within the ODR Manual as authority for its December 9, 2008, order, was without the authority under law to order the District to provide the translated transcript at issue herein.[35]

Zhou's holding that ODR's "Special Education Dispute Resolution Manual" constituted "at best" a general statement of policy is especially telling, considering that ODR's "Your Guide to Mediation" is actually less formal[36] than the manual in *Zhou* and in no way can be likened to an administrative rule or any formal establishment of ODR's procedures as mandated by the IDEA. In its prohibition of attorneys, ODR did not use either of the two methods for formulating policy that would have the force of law.[37] ODR's mediation guide is a statement of policy, which does not establish a "binding norm." Thus, its directive that parents and school districts are prohibited from bringing attorneys to mediation is without authority under the law.[38] ODR continues to improperly enforce this "rule": as of the writing of this Article, attorneys in Pennsylvania are not permitted to attend mediation, which may have resulted in countless unfair (and possibly illegal) settlements. Pennsylvania is engaging in inappropriate rulemaking that is in direct contravention

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[32] *Id*. at 1286.

[33] *Id*. at 1286-87.

[34] *Id*. at 1287.

[35] *Id*. at 1288-89 (citing Pa. Human Relations Comm'n v. Norristown Area Sch. Dist., 374 A.2d 671, 679 (Pa. 1977)) (internal citations omitted).

[36] OFFICE OF DISPUTE RESOLUTION, SPECIAL EDUCATION DISPUTE RESOLUTION MANUAL (2009), *available at* http://odr-pa.org/wordpress/wp-content/uploads/SEDR-man.pdf. The Special Education Dispute Resolution Manual consists of sixty-eight pages that outline with specificity the due process complaint process. Comparatively, the twelve pages of "Your Guide to Mediation" is an introductory guide to the mediation process aimed to assist parents. *See* ODR MEDIATION GUIDE, *supra* note 2.

[37] *See Norristown*, 374 A.2d at 679 ("An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.").

[38] *Id*. ("A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.").

of the statutory requirement under the IDEA, the Administrative Agency Law, and established case law.

IV. THE COLLATERAL BENEFITS OF HAVING AN ATTORNEY PRESENT IN MEDIATION

The collateral benefits of having an attorney further supports allowing counsel to be present in mediation. A 2010 examination of representation in mediation by Roselle L. Wissler noted that, in special education mediation, "unrepresented parents and parents with non-lawyer advocates thought the mediation process was less fair than did parents who had lawyers."[39]

Having an attorney present at mediation formalizes the process while still preserving the benefits of mediation—informal presentations and lesser evidentiary procedures that permit expediency.[40] Notably, in Pennsylvania, mediation is expected to take no more than a day[41] and mediators receive only brief synopses from case managers.[42] Compressing into a single day the details of a special education case that may span issues about a child's education for at least a two-year timeframe[43] can be overwhelming and can make mediation meaningless. The recommended expediency of mediation lends itself to hurried results that may be damaging both to parents and to children. In particular, a case that is complicated or requires addressing various remedies is best handled when an attorney is present. Attorneys can help summarize history, clarify positions, and seek remedies that may not have been considered if only the parties and mediator were present.

Lawyers can help tailor remedies, such as agreements that the school district provide independent evaluations or compensatory education, that may better suit a child than simply revising an IEP. Lawyers who work closely with families have an understanding that mediators may not have—they have consulted with specialists, met with the family numerous times, and considered possible options to come to an agreement. Without an attorney, the mediator's inability to work productively within time constraints may derail a successful mediation. With an attorney present (and a representative of the school district with the authority to commit resources), a productive conversation can take place.

Additionally, while not yet specifically studied within the special education mediation context, there is evidence suggesting that the presence of attorneys correlates with the use of proper protocol in mediation. For example, Wissler's examination showed that mediators were more likely to use domestic violence protocols during domestic-relations mediation when lawyers were present.[44] This suggests that the presence of attorneys influenced mediators to use proper

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[39] Wissler, *supra* note 23, at 439.

[40] *See generally* Beyer, *supra* note 17, at 46-47 (explaining the efficiency savings and procedures of effective mediation).

[41] ODR MEDIATION GUIDE, *supra* note 13, at 4 (describing a typical mediation session as lasting for up to a day or an evening).

[42] Telephone Interview with Judy Carl, Special Education ConsultLine Advisor, Office of Dispute Resolution (November 1, 2011).

[43] *See* Steven I. v. Cent. Bucks Sch. Dist., 618 F.3d 411, 417 (3d Cir. 2010) (imposing a two-year statute of limitations on IDEA claims).

[44] Wissler, *supra* note 23, at 440-41 ("Mediators were less likely to say they used domestic violence protocols when neither party had a lawyer present in mediation (74%) than in cases where one (81%) or both (88%) parties had lawyers in mediation."). The Wissler study analyzed Equal Employment Opportunity, domestic-relations, and

protocol, or that lawyers were able to alert mediators to certain issues that should be discussed.[45]

Moreover, lawyers can be emotionally objective while maintaining an advocacy position during the discussion. Lawyers balance representing their client zealously with remaining logical and objective, which is the appropriate complement to passionate and expressive parents. Parents may use mediation as a way to take out their frustrations with what they perceive are inadequacies concerning their child's special education, leading to "mediation sessions [that are] characterized by volatile emotions and vulnerability."[46] Being able to see through the fog of frustration, anger and confusion that some parents experience when dealing with school districts is a valuable aspect of having an attorney present in mediation.

While parents may find it difficult to be objective about testing requirements, classroom placements, and the school district personnel handling their child's special education placements,[47] attorneys have already discussed these options with their clients prior to mediation and can refocus their client if necessary. Critics contend that a mediator alone can assuage tension between the parties; however, a mediator's use of facilitative techniques may only go so far. As a mediator may not guide parents back on track by employing evaluative methods,[48] it is the attorney's place to help parties assess the strength of their positions. Moreover, lawyers can help parents develop their narrative and weave it into a coherent assessment of what they want from mediation. In helping parents evaluate their positions and by providing honest feedback, attorneys can increase the likelihood of a successful mediation.

With an attorney present, parents are also more likely to be able to assess the risks and benefits of settlement, contemporaneously leading to fewer appeals of mediation agreements. In the 2004 amendment to the IDEA, Congress clarified that mediation agreements are legally binding and are to be enforceable in both state and federal courts.[49] The federal courts' power to ensure that settlement agreements are honored gives "teeth" to the statutory provision and further supports Congress' goal to have mediation become the predominate mechanism for dispute resolution. Because of the 2004 amendment, most courts, including the Third Circuit, are "unsympathetic to parents' claims that settlements gave away too much or that they were taken advantage of in the bargaining process."[50]

In particular, *D.R. v. East Brunswick Board of Education* illustrates how courts view mediation settlement agreements.[51] In *D.R.*, the parents of a student who had multiple disabilities

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special education mediations. *Id*. at 426, 431.

[45] *Id*. at 441.

[46] 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, 662 (2004).

[47] *See* Marchese, *supra* note 16, at 351.

[48] *See, e.g*., Beyer, *supra* note 17, at 50. Congress ignored the possibility that mediators may engage in the unauthorized practice of law by offering predictions or assessments of how a court may analyze the dispute, which ultimately allows mediators to serve "a legal function by applying principles of law to concrete facts." *Id*.

[49] *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(e)(2)(F), 118 Stat. 2647, 2720 (codified as amended at 20 U.S.C. § 1415(e)(2)(F) (2006)). Prior to the amendment, case law was unclear on the ability of the federal courts to enforce mediation agreements, leaving parties to bring claims for enforcement through contract law. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: SPECIAL EDUCATION LAW 112 n.127 (2d ed. 2006).

[50] Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up is Hard to Do*, 43 LOY. L.A. L. REV. 641, 652 (2010).

[51] 109 F.3d 896, 897-98 (3d Cir. 1997); *see also* Marchese, *supra* note 16, at 358-61 (discussing the *D.R.*

entered into a settlement agreement whereby the school district would pay a specified amount for the private school costs for the student.[52] The school district refused to pay any additional costs including costs for the services of a special classroom aide and a special residential aide.[53] The parents disagreed and sought review before a New Jersey Administrative Law Judge (ALJ).[54] After the ALJ dismissed the parents' claim, they appealed to the U.S. District Court for the District of New Jersey, which held that the school district was liable for the additional costs pursuant to the change in circumstances that increased the costs.[55] On appeal, the Third Circuit held that the settlement agreement was enforceable.[56] The court was concerned that finding for the parents "would work a significant deterrence contrary to the federal policy of encouraging settlement agreements."[57] The holding in *D.R.* has been followed several times since the 2004 amendment to the statute.[58]

D.R. and its progeny illustrate that the IDEA lacks a safety net for unsophisticated or unwary parents who enter into mediation settlements.[59] School districts may be eager to get unsophisticated, unrepresented or weak parents into mediation and win concessions that they may not get in due process hearings or in other avenues where lawyers can attend.[60] And, because of courts' willingness to uphold these agreements, parents are left often with no recourse. Unsympathetic courts coupled with the prominence of a power imbalance between the two parties results in unfair settlements.[61]

Having an attorney present in mediation mitigates the concerns surrounding enforcement

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decision as demonstrating the necessity of parents being well-informed about the consequences of mediation).

[52] 109 F.3d at 899.

[53] *Id*.

[54] *Id*.

[55] *Id*. at 900.

[56] *Id*. at 901.

[57] *Id*. (citing McDermott, Inc. v. AmClyde, 511 U.S. 202, 215 (1994) ("Public policy wisely encourages settlements.")).

[58] *See, e.g*., Ballard v. Phila. Sch. Dist., 273 F. App'x. 184 (3d Cir. 2008). In *Ballard*, the court applied the *D.R*. analysis to hold that settlement agreements reached between parent and school district were binding. *See id*. at 188. The court held that since a parent can waive his or her child's right to FAPE, entering into the settlement agreement that falls short of providing the child with FAPE does not inherently violate law or public policy because "[p]arties routinely enter into agreements to resolve litigation." *Id*. at 188. The holding in *Ballard* is illustrative: parents enter into mediation believing that they will come to an agreement that *better* positions their children to receive proper special education, and it can result in them waiving the child's statutory protections. *See also* Muse B. v. Upper Darby Sch. Dist., 282 F. App'x. 986, 989 (3d Cir. 2008) (holding that the Consent Decree was voluntarily and willingly entered into by the plaintiff and therefore a binding contract).

[59] In contrast, parents can attend essentially mandatory resolution sessions—another way to resolve special education disputes—and have a three-day rescission period if they sign an agreement in the meeting and change their minds or learn of their rights after the fact. 20 U.S.C. § 1415(f)(1)(B)(iv) (2006). Lawyers can attend these resolution sessions. *Id*. § 1415(f)(1)(B)(i)(III). However, resolution sessions are distinct from mediation sessions; confidentiality does not necessarily apply. *Cf*. 34 C.F.R. §300.506(b)(6) and following with 34 C.F.R. §300.510.

[60] Marchese, *supra* note 16, at 357. ODR's 2010-2011 report emphasizes the success of mediations reached; however, the data does not include the complexity of the case, the remedies agreed upon, or the sophistication of the parents. *See* ODR REPORT, *supra* note 11.

[61] *See* Marchese, *supra* note 16, at 360 ("The Court of Appeals assumed a relative level of equality between D.R.'s parents and the school district and further implied that each of the parties was competent to negotiate the terms of their agreement and understood the risks involved.").

and appeals of mediation agreements. The support that an attorney provides during mediation helps parents evaluate their positions immediately, resulting in fewer concessions because they can caucus with their attorneys to make sure they are not forfeiting issues they considered essential. This allows parents to ultimately live with their decisions and not pursue an appeal. In turn, this leads to an infrequent—yet better—use of the appellate courts. Judges may be more likely to believe that an appeal from a settlement has merit because an attorney was present and able to help the parents assess the benefits and risks.[62] When there is an appeal, the court may view this decision as something that has been seriously considered by the attorney and is not a consequence of regret.

V. RESPONSE TO THOSE IN FAVOR OF ATTORNEY EXCLUSION

A. Attorney Participation is Consistent with the Spirit of Mediation

While the number of states that prohibit attorneys from mediation has shrunk to just one, there is a still a small chorus of voices who favor attorney exclusion. Commentators believe that having an attorney present in mediation creates an adversarial environment that is antithetical to what some perceive as the collaborative atmosphere of mediation. However, this explanation is contrary to various studies and anecdotal evidence that suggests that the presence of a lawyer can help parents attain their goals while mediation remains a non-contentious environment.[63]

The view that attorneys undermine mediation by using adversarial approaches is overstated. Stories of attorneys "who polarize discussions, make unreasonable demands, and promote an atmosphere of tension in deliberations,"[64] abound in special education circles. However, the Wissler study showed that these fears are misplaced. In analyzing how attorney representation affects mediation, Wissler concluded that "[t]he research also suggests that lawyers' presence in mediation might not create some of the problems feared. Lawyers do not appear to be associated with more contentious mediation sessions or with more limited

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[62] *See, e.g.*, Bristol Twp. Sch. Dist. v. S.W., No. 09-4101, 2010 WL 3522101, at *3 (E.D. Pa. July 12, 2010). In *S.W.*, the parents contended that the settlement agreement reached was unenforceable because they would not sign a release waiver. *Id. at* *1. The court held that the waiver/release provisions were reasonably contemplated by both parties as terms of the settlement agreement, especially in light of the assistance by experience and competent counsel. *Id.* at *3. The court further held that "[w]hen a settlement agreement is the product of lengthy and arms length negotiations *conducted by experienced counsel* and with the direct involvement of the parties and an experienced judicial official and where the outcome is not inconsistent with federal or state law, is in the best interest of the child and is beneficial to the public good, it will be upheld." *Id.* (emphasis added) (citing Gaskin v. Pennsylvania, 389 F. Supp. 2d 628, 642 (E.D. Pa. 2005)). The holding in *S.W.* is illustrative because the presence of counsel played an integral part in why the court did not believe that the parents did not contemplate the waiver provisions in the agreement. *But see In re I.K.,* 111 LRP 56841, SpecialEdConnection Case Report, online LRP Publications (Office of Dispute Resolution July 8, 2011) (finding by a hearing officer that although parent's attorney assented to school district's offer, parent did not give informed consent and thus settlement was not reached between parties).

[63] Letter to Decker, 19 IDELR 279, SpecialEdConnection Case Report, online LRP Publications (Office of Special Educ. and Rehabilitative Servs. July 10, 1992) (discussing attorneys at mediation).

[64] EDWARD FEINBERG & JONATHAN BEYER, CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., 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.

discussions of feelings or settlement options."[65]

Wissler found that the presence of lawyers neither substantially increased nor decreased the adversarial nature of the mediation in the domestic relations context because of the professional norm of collaborative problem solving amongst lawyers in that particular context.[66] The same is true in the special education context where IEP teams cooperatively work together, often for years, to create the child's educational services.[67] While mediation is often the result of dissatisfaction, this does not eradicate the long-standing relationships between the parties. Additionally, the professional norms of special education encourage cooperation, promoting collaboration, and the local and specialized nature of the practice area.[68]

Critics also suggest that the presence of attorneys impedes direct stakeholders from engaging one another directly. Suggesting that mediation would become a place where lawyers and clients would caucus with one another with "no direct brainstorming and discussion"[69] between stakeholders is unfounded. The Wissler study concluded that whether or not parties were satisfied with their participation in mediation is a highly individualized inquiry based on factors such as the representatives' approach to mediation and their views of the relative benefits and risks of direct party participation, the type of case, the local legal and mediation cultures, and the representatives' experience with mediation.[70] It logically follows that the amount of parental participation in mediation would be individualized based on the nature of the relationship between the parents and their attorneys. The progression of a mediation session—the opening statement, joint sessions, and agreement writing—may lend themselves to different levels of attorney participation. For example, agreement writing is likely to be the place where attorney participation would be highest in order to construct a valid agreement that expresses the parties' true intentions.

It is also worth noting that lawyers acting as a "buffer" or sounding board for their clients has positive implications.[71] Wissler found that parties who said that their lawyer talked more felt less pressure to settle.[72] The presence of an attorney may help ease parents' discomfort and provide them with more opportunities to caucus with the mediator. Most importantly, a lawyer may act as a check against uninformed and pressured settlements because they discourage parents from agreeing to unfair proposals or push the other side to improve upon their concessions.[73] Attorney participation in mediation has been shown to safeguard parent interests

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[65] Wissler, *supra* note 23, at 468.

[66] *Id*. at 454.

[67] IEP teams include parents, their child's special education teachers, specialists, school district personnel, attorneys and any other individuals "who have knowledge or special expertise regarding the child." 20 U.S.C. § 1414(d)(1)(B)(vi) (2006).

[68] *See, e.g*., Wissler *supra* note 23, at 454 (explaining specific factors of family law practice that facilitate a collegial mediation environment).

[69] FEINBERG & BEYER, *supra* note 64, at 9.

[70] Wissler, *supra* note 23, at 446; *see also* Kuriloff & Goldberg, *supra* note 16, at 63-64 (discussing that a sense of participation in mediation does not automatically engender feelings that mediation was fair).

[71] *See, e.g*., Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 272-74 (1976) (suggesting that representatives might serve as a buffer by reducing direct interaction between the parties).

[72] Wissler, *supra* note 23, at 451.

[73] *See, e.g*., discussion *supra* Part II; *see generally* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 811-12 (1999).

while maintaining the decorum expected in mediation.

B. The Role of Mediators Does Not Provide Adequate Protection to Parents

Commentators of the mediation process suggest that mediators provide adequate protection against the power imbalance between parents and school districts. Yet the suggestion that mediators protect the equity of the process by playing an active role in the mediation, where they employ "evaluative, as opposed to facilitative, mediation techniques,"[74] is contrary to the directive of the IDEA as well as established mediation procedures.

Mediators are meant to be neutral parties and should not actively assist parents or the school district. The IDEA codifies the impartiality of the mediator.[75] Assisting parents in assessing risks and offering them recommendations is incongruous with a mediator's mandatory neutrality. Without an attorney present, mediators may feel pressure to help parents but do not know how to do so without undermining their role as mediator and possibly engaging in the unauthorized practice of law.[76] Not only could a mediator's objectivity be compromised, but actively assisting one party may lead to jealously, which would seriously impede the parties' relationship and ability to reach an agreement.[77] These concerns can be allayed by permitting attorneys in mediation, which will maintain the proper roles of the parties involved in mediation. It is the attorney's role to be an advocate—to help the parents assess their goals and deficiencies and approach the mediation with a plan to achieve those goals and overcome those deficiencies—not the mediators.

Mediator bias in favor of the school district is also an issue that can be counterbalanced with the presence of the parents' attorneys, at least where, as in Pennsylvania, mediators are usually educators:

> At the time that this research was conducted, few, if any, Pennsylvania special education mediators were parents of children with disabilities. In contrast, experience in education was considered advantageous when applicants were screened for the roster of special education mediators. It is revealing that experience as an educator was considered helpful while experience as a parent

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[74] FEINBERG & BEYER, *supra* note 64, at 10. "[A] special education mediator may interpret jargon, assess risks, and offer recommendations for parents in order to ensure a fair negotiation." *Id*.

[75] A mediation must be "conducted by a qualified and impartial mediator who is trained in effective mediation techniques. 34 C.F.R. § 300.506(b)(1)(iii) (2011). "[A] mediator . . . [m]ust not have a personal or professional interest that conflicts with the person's objectivity." 34 C.F.R § 300.506(c)(1)(ii) (2011). The ODR Mediation Guide describes the mediator as a "facilitator." *See* ODR MEDIATION GUIDE, *supra* note 2, at 8.

[76] *See, e.g.*, Welsh, *supra* note 46, at 657.

> The mediators need to be ready and able to serve as responsive translators and coaches, while avoiding becoming partisan advocates. This is a very difficult distinction of roles and, indeed, may even suggest that parents should be allowed to have attorneys speak on their behalf in special education mediation sessions.

Id. *See also* Beyer, *supra* note 17, at 50 (noting that mediators may engage in the unauthorized practice of law by helping to draft settlement agreements and serving the legal function of "applying principles of law to concrete facts").

[77] *See, e.g.*, Wissler, *supra* note 23, at 424 (stating that a mediator's neutrality may be compromised if "unrepresented parties seek their advice or support," and that unrepresented parties may "feel the process is unfair if mediators don't assist them").

> was not. These selection criteria may need to change in order to enhance mediation's capacity to send a stronger signal, particularly to parents, that mediation is meant to facilitate *reciprocal* voice, *reciprocal* consideration, and *joint problem* solving.[78]

If mediators are innately responsive to school districts, they may unintentionally employ evaluative techniques in favor of the school district.[79] Not understanding the heightened emotions that parents bring to mediation could make a mediator perceive parents as unwieldy and out of control, as compared to the calm, composed representatives from the school district. Moreover, the likelihood that mediators come into repeated contact with school district representatives is high, which lends itself to fostering professional relationships between the parties. This, ultimately, can lead the mediator to have more confidence that the school district is correct. The presence of attorneys can counterbalance potential mediator bias by ensuring that parents' stories are told in a way that mediators can digest, and that school districts do not enjoy unearned or unequal deference in mediation.

Another potential consequence is the mediator's failure to recognize that school districts may have access to attorneys during mediation. School districts likely discuss upcoming mediations with school board solicitors and may even be coached by them during mediation.[80] Additionally, there is a growing trend across the nation where school districts hire administrators who hold law degrees and allow them to participate in mediation.[81] If mediators and/or parents are not aware of these "legally trained" administrators, mediation becomes an unfair process whereby the school district has access to substantive legal knowledge while parents do not. The presence of attorneys can counterbalance these inequities and ensure that school districts do not gain the upper hand.

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[78] Welsh, *supra* note 46, at 660. As of the writing of this Article, ODR employed twenty-four mediators, ten of whom had backgrounds in education. None of the mediators' biographies note whether they are parents of children with special education needs. *Mediators' Bios*, OFFICE OF DISPUTE RESOLUTION (Sept. 22, 2011), http://odr-pa.org/wordpress/wp-content/uploads/MedOcc1.pdf.

[79] *See, e.g.*, Reuben, *supra* note 19, at 1092 ("In this regard, it is easy to see how a biased mediator can exploit such an imbalance to the detriment of the nonfavored party or parties through techniques that silence, trivialize, or affirmatively reject their views and opinions.").

[80] *See, e.g.*, Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 31 (2006).

> Although removal of the school attorney equalizes matters a little for the parents who have no lawyer, neither the statute's terms nor the proposed regulations specify how far away the school district lawyer must stay. It takes little imagination to conjure something like a grand jury proceeding in which someone is continually leaving the room to consult with the attorney.

Id.

[81] As a disabilities rights lawyer for over twenty years, the author of this Article, Sonja Kerr, has personally encountered administrators who hold law degrees in several states including Alaska, Minnesota, and Pennsylvania. Additionally, the author conducted an informal survey soliciting inquiries regarding whether this was a national practice. She received answers from attorneys and parents in Chicago, IL, San Francisco, CA, Canejo Valley, California, Washington DC, and Douglas County, CO specifying that they have interacted with school district administrators who hold law degrees. Many account that these administrators are not forthcoming with their qualifications and that some have attended meetings regardless of whether the parents are represented by attorneys. Posting of Sonja Kerr, sonjakerr6@gmail.com, to COPAA Lawyer Listserv (Oct. 29, 2011) (responses on file with author).

C. Parents Should Be Able to Choose Between Attorneys or Lay Advocates to Attend Mediation with Them

Some observers of the mediation process contend that lay advocates, usually parents who have children with disabilities, are the most appropriate representatives of parents during mediation.[82] Lay advocates[83] are an essential component to successfully navigating a child's special education options. During mediation, lay advocates can provide vital information regarding implementation of IEPs, therapies, and alternative learning techniques. A lay advocate's strength lies in having an intimate knowledge of the individual educational needs of the child. However, this does not necessarily correspond with successfully navigating mediation. Full engagement in mediation also requires a skill-set that focuses on knowledge of the law and negotiation skills, which is often better suited for an attorney.[84]

Moreover, even the most experienced lay advocate may have difficulty with cases that involve past claims, multiple claims issues, complicated legal issues, or situations in which an attorney has already been involved. These cases lend themselves to attorney participation. Permitting both an attorney and a lay advocate to be present may be another way to conduct mediation and fulfill the intention of the IDEA to provide parents with sufficient support so that they can successfully advocate for their children.

When an attorney is present, lay advocates do not have to exceed their professional qualifications to advocate for their client. This is even more relevant considering the fact that related and past claims may go unnoticed or mischaracterized if non-lawyer advocates are the only parent representatives allowed in mediation. Sexual harassment, discrimination, and tort are all bases of claims that can be found in tandem with special education matters and which may require special handling.[85] These issues may not be fully addressed without the assistance of an attorney who can help craft a mediation agreement that speaks to these concerns or can accurately assess if a due process hearing is necessary to resolve the claims.

Where lay advocates participate in mediation alone, the lack of professional conduct requirements for advocates is troublesome. The trilogy of professional conduct protections—certification, a code of ethics, and a complaint process—are glaringly missing from the requirements that lay advocates need to abide by in Pennsylvania. While the Council of Parent Attorneys and Advocates (COPAA), a national organization, encourages lay advocates to seek training, it readily recognizes that there is no minimum training requirement to become a special

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[82] FEINBERG & BEYER, *supra* note 64, at 10 ("The Pennsylvania advocacy community strongly supports the exclusion of attorneys, maintaining that parents who have children with disabilities can be trained to be effective representatives for other parents."). The Public Interest Law Center of Philadelphia is one of the key members of the Pennsylvania advocacy community and has prepared this article because of concern about the exclusion of attorneys. Not all members of the Pennsylvania advocacy community, however, currently support exclusion of attorneys. *See, e.g.*, Letter from Dennis McAndrews, Parent Attorney Representative to the ODR Stakeholder Council, to author (Dec. 16, 2010) (on file with author).

[83] The term "lay advocate" does not appear within the IDEA but it generally derives from the definition at 34 C.F.R. § 300.512(a)(1) entitling parents to be accompanied at hearings by "individuals with special knowledge or training with respect to the problems of children with disabilities", and by 34 C.F.R. § 300.321(a)(6) to be accompanied at IEP team meetings by "other individuals who have knowledge or special expertise regarding the child."

[84] *See, e.g.*, Wissler, *supra* note 23, at 420.

[85] *See, e.g.*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272 (3d Cir. 1996) (bringing IDEA claims alongside ADA and section 1983 claims); Payne v. Peninsula Sch. Dist., 653 F.3d 863 (9th Cir. 2011) (intertwining IDEA claims with negligence and constitutional claims).

education advocate.[86] Thus, Pennsylvania would need to require training and certification of lay advocates. Yet, Pennsylvania has failed to create any organization—under the direction of ODR or otherwise—that specifically requires lay advocate training for mediation or working with IDEA provisions.

The absence of training or certification requirements may lead to uneven representation or even detrimental legal consequences. Certification and licensure requirements provide regulatory safeguards that ensure lay advocates are taught how to properly advocate for parents without deviating from a normal standard of practice. Without such requirements, lay advocates may make statements that could have legal significance in later proceedings, or they could mistakenly engage in the unauthorized practice of law.[87] ODR's failure to ensure the quality of the services provided by lay advocates further emphasizes the need for attorneys during mediation.

Non-lawyer advocates in Pennsylvania also lack a mandatory code of professional ethics to guide their conduct. While there is a code of professional conduct that lay advocates may abide by, it is voluntary[88] and does not give way to a complaint procedure or malpractice suit if conduct falls below the given standard. Conversely, attorneys must abide by the utmost professional ethics even in non-adjudicative proceedings, such as mediation.[89] If permitted to attend mediation, lawyers and their clients will know that these professional conduct rules apply. Attorneys are aware of the boundaries of their conduct, and the possibility of a malpractice suit provides attorneys with an incentive not to cross those limits. The absence of policing mechanisms for lay advocates puts parents at a substantial risk of receiving substandard representation, for which they have limited recourse. Attorney representation, on the other hand, provides the highest level of professional conduct protection and best serves the vulnerable population using mediation.

VI. IMPLICATIONS AND PROPOSALS

The arguments set forth in this article strongly support the conclusion that attorneys must have a place at the table during mediation. A variety of possible reforms would provide parents with more robust and equalized bargaining and informational power.

First, parents should be allowed to have an attorney present in mediation if the school district has an attorney on retainer or brings to the mediation an individual who is legally trained. Some states permit school districts to have attorneys only if parents retain counsel for purposes of

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[86] *Training to be a Special Education Advocate*, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, http://www.copaa.org/membership/advocates/training-to-be-a-special-education-advocate/ (last visited Jan. 22, 2012).

[87] *See, e.g.*, Beyer, *supra* note 17, at 50 (emphasizing that Congressional inaction "ignores the possibility that IDEA mediators may in fact practice law"); Daniel C.W. Lang, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289, 306 (2011) ("In addition to an abbreviated education, some form of certification or licensure should be put in place to ensure that all nonlawyer advocates are qualified in their areas of expertise.").

[88] *Voluntary Code of Ethics for Special Education Advocates*, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, http://www.copaa.org/membership/advocates/791-2/ (last visited Jan. 22, 2012) (offering a model Voluntary Code of Ethics for special education advocates).

[89] PA. R. PROF'L CONDUCT. R. 3.9 cmt.2 (2004) ("Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.").

mediation.[90] However, this requirement may prevent the effective equalization of the power disparity that is pervasive in mediation. Even without counsel physically present at a mediation, school district representatives may already be well versed in the process; in addition, if the district has an attorney or legally trained person on staff or a law firm on retainer, school district representatives can call the attorney before the mediation or consult by phone during the process.[91] The "attorney in the room" standard allows for an unfair advantage whereby a school district can technically abide by a state's directive prohibiting practicing attorneys but in effect gives the school district substantial legal knowledge unavailable to the parents who must attend mediation without an attorney.

Second, if ODR continues to prohibit attorney participation (assuming the unpromulgated practice were to become a properly promulgated regulation), there are two exceptions that should be permitted. The first exception is when both parties stipulate that they may have attorneys present. As it is appropriate in civil litigation for parties to stipulate issues by and between themselves,[92] parents and school districts should have the authority to do so in this situation. This is especially critical where parents and school districts are already engaged in the special education administrative hearing process and both sides have already retained counsel.

The second exception is when the parents are represented by a legal aid organization. The likelihood that parents represented by a legal aid organization are from a disadvantaged background and will need an attorney to equalize bargaining and informational power is great.[93] Issues with comprehension, intimidation, and lack of resources lead poor parents to be severely disadvantaged in mediation.[94] Additionally, the substantial cost of lay advocates, or the unavailability of those who provide services for free, means that under the current Pennsylvania rules, poor parents will likely attend mediations alone.[95] ODR should recognize that legal aid representation provides the greatest protection to those parents who are most vulnerable and that they should be afforded the same opportunities as wealthier parents.

Lastly, congressional action should be taken to address lingering hurdles regarding attorneys' fees for mediation. Following *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[96] there is a disincentive for attorneys to settle cases

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[90] *See generally Attendance at Mediations by Non-Attorney Employees of Law Offices*, DEP'T OF EDUC. OF ME. (Aug. 20, 2010), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=edu_letters&id=123799&v=article ("School administrative units . . . may be represented by counsel in a mediation only when the parents are represented by counsel.").

[91] *See*, *e.g.*, Weber, *supra* note 80, at 31 (discussing the effect of power disparities between repeat-player districts and the single-time-player parents on settlement promotion).

[92] Parties in civil litigation can stipulate to discovery procedures and voluntary dismissal of cases. *See* FED. R. CIV. P. 29; FED. R. CIV. P. 41(a)(1)(A)(ii).

[93] *See* Kuriloff & Goldberg, *supra* note 16, at 62 (suggesting that lawyers provide poor parents with affirmative support when mediating special education disputes).

[94] *See supra* note 22, 23 and accompanying discussion.

[95] There is no standard cost of non-lawyer advocates in Pennsylvania. Lay advocates may range from $25/hour for advocates with little experience or training to upwards of $150/hour for advocates who have years of experience, training, and possibly a paralegal background. Lay advocates are provided for free by certain nonprofit organizations, but it is often the case that they are not available to provide services for all families in need because of their high caseload. Interview with Becca Devine, Private Nonlawyer Advocate, in Phila., Pa. (Nov. 2, 2011).

[96] 532 U.S. 598 (2001). The Supreme Court held in *Buckhannon* that explicit statutory authority fees to a "prevailing party" are available only when the legal relationship of the parties has been altered. *Id*. at 605. The Third Circuit has held *Buckhannon* to apply to IDEA mediation. *See* John T. v. Del. Cnty. Intermediate Unit, 318 F.3d 545, 556

through mediation because fees may not be granted. This runs afoul of the congressional intention to encourage mediation:

> It would be strange indeed if the only way in which the congressional and state intention of allowing fees on mediations to be accomplished would be if the parties voluntarily included the fees as part of the settlement agreement. In that instance, any dispute over the propriety or amount of fees would automatically derail the mediation, and the legislative decision to make fees available would defeat the goal that Congress and the state intended to encourage.[97]

The policy and statutory-construction arguments against applying *Buckhannon* to IDEA settlements dictate that Congress should correct the statute to encourage mediation by permitting attorneys' fees for resolving cases through mediation. Various solutions have been proposed to fix the ambiguity regarding fees ranging from parties seeking their attorneys' fees in court after completing mediation,[98] congressional permission allowing hearing officers to enter consent decrees on behalf of parents,[99] and a congressional amendment providing courts with the authority to deem parents a "prevailing party" regardless of judicial imprimatur.[100] These solutions call on Congress to address concerns over attorneys' fees.

VII. CONCLUSION

The right for parents to have counsel in mediation is integral to fair and successful outcomes. Lawyers help to equalize power imbalances while assisting parents in developing their positions in advocating for their children. Their presence helps maintain a collegial and collaborative environment without foregoing proper protocol or disregarding the complexities of the cases. Moreover, lawyers have a unique role that cannot be filled by the mediator or the lay advocate.

(3d Cir. 2003) (denying attorneys' fees in IDEA mediation when plaintiff was not a "prevailing party" because relief granted was not based on the merits of plaintiff's claims); *cf.* T.F. v. N. Penn Sch. Dist., No. 98-6645, 1999 WL 627919, at *5-6 (E.D. Pa. Aug. 18, 1999) (permitting recovery of attorneys' fees from settlements deriving from IDEA mediation since plaintiffs were "prevailing parties" in a pre-*Buckhannon* case).

[97] Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 65 OHIO ST. L.J. 357, 379 (2004). Congress' goal to encourage the use of mediation is further indicated by the fact that states have the authority to permit attorneys' fees. *See* 20 U.S.C. § 1415(i)(3)(D)(ii) (2006) ("Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, *at the discretion of the State*, for a mediation described in subsection (e).") (emphasis added). This is compared to resolution meetings where federal law prohibits fees for resolution meetings unless there is a meeting convened due to administrative action or judicial action. 20 U.S.C. § 1415(i)(3)(D)(iii). Thus, technically, Pennsylvania could proceed to permit attorneys' fees for mediation; it has just chosen not to do so.

[98] *Id.* ("Congress intended . . . parents who believe they prevailed to seek attorneys' fees from the courts while the school system implements the settlement agreement . . . .").

[99] Weber, *supra* note 50, at 665.

[100] Stefan R. Hanson, Buckhannon, *Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 558 (2003) (explaining that Congress could allow courts to "deem parents 'prevailing parties' when they have substantially achieved the relief they were seeking, regardless of judicial *imprimatur* or other formal outcome . . . .").

It is imperative that ODR immediately addresses the administrative law and constitutional concerns regarding the practice that prohibits attorneys from mediation. So long as it does not do so, ODR continues to ignore its statutory requirements as well as the spirit of the IDEA that gives power to parents to protect the rights of themselves and their children in the IDEA process.