

# **A Brief Model for Explaining Dispute Resolution Options in Special Education**

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## I. INTRODUCTION

The Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> provides a “free appropriate public education” (“FAPE”)<sup>2</sup> to children with disabilities<sup>3</sup> in the United States. The IDEA also contains procedural safeguards to protect the rights it provides.<sup>4</sup> Those procedural safeguards include three dispute resolution options<sup>5</sup>: mediation,<sup>6</sup> complaints to the state education agency,<sup>7</sup> and

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<sup>1</sup> 20 U.S.C. §§ 1400–1401 (2016).

<sup>2</sup> *Id.* § 1401(9); *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); Dixie Snow Huefner, *Judicial Review of the Special Educational Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going*, 14 HARV. J.L. & PUB. POL’Y 483 (1991); Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE Under IDEA?*, 79 EXCEPTIONAL CHILD. 497 (2013); Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for “Free Appropriate Public Education?”*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 397 (2008); Perry A. Zirkel, *Building an Appropriate Public Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983).

<sup>3</sup> 20 U.S.C. § 1401(3).

<sup>4</sup> *Id.* § 1415; Dixie Snow Huefner, *A Model for Explaining the Procedural Safeguards of IDEA* ’97, 134 EDUC. L. REV. 445 (1999); Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement Under the IDEA?*, 15 CONN. PUB. INT. L.J. 1 (2016).

<sup>5</sup> See generally Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) [hereinafter *Dispute Resolution Procedures*]; Perry A. Zirkel, *A Comparison of the IDEA’s Dispute Resolution Processes: Complaint Resolution and Impartial Hearings*, 326 EDUC. L. REP. 1 (2016); Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010); Katherine McMurtrey, Comment, *The IDEA and the Use of Collaborative Dispute Resolution in Due Process Disputes*, 2016 J. DISP. RESOL. 187, 189.

<sup>6</sup> 20 U.S.C. § 1415(e); see also, e.g., NISSAN B. BAR-LEV ET AL., CONSIDERING MEDIATION FOR SPECIAL EDUCATION DISPUTES: A SCHOOL ADMINISTRATOR’S PERSPECTIVE (Consortium for Appropriate Dispute Resolution in Special Education ed., 2002), available at <https://files.eric.ed.gov/fulltext/ED471809.pdf>; Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37 (1999); Steven S. Goldberg & Dixie Snow Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 Educ. L. Rep. 703 (1995); Michael Hazelkorn et al., *Alternative Dispute Resolution in Special Education: A View from the Field*, 21 J. SPECIAL EDUC. LEADERSHIP 32 (2008); Philip Moses & Timothy Hedeon, *Collaborating for Our Children’s Future: Mediation of Special Education Disputes*, 18 DISP. RESOL. MAG. 4 (2012); Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard to Do*, 43 LOY. L.A.L. REV. 641 (2010).

<sup>7</sup> 34 C.F.R. §§ 300.151–300.153 (2016); Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2008).

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due process complaints.<sup>8</sup> A segment of the dispute resolution literature describes (or appears to describe) these processes along a linear continuum of combativeness, with mediation described as the least adversarial, and due process complaints described as very adversarial.<sup>9</sup> The problem with this one-dimensional continuum is that it may not fully describe the reasons parties choose dispute resolution. The degree of the adversarial nature is only one reason why a party may choose a dispute resolution option, and it may not even be the most relevant reason. The purpose of this article is to provide an additional way to explain to parents and school officials the key differences between the IDEA's dispute resolution processes through using a multidimensional model. In addition to adversarial-versus-not, I contend that a multifactor model is an additional and effective way to explain the differences between these processes. This multifactor model is based on the degree to which each process offers the parties varying amounts of finality (the ability to have a dispute resolved) and control (the ability to be the author of any resolution).

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<sup>8</sup> 20 U.S.C. § 1415(b)(2), (c)(2), (f)-(j); see generally Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994); see also Tessie Rose Bailey & Perry A. Zirkel, *Frequency Trends of Court Decisions Under the Individuals with Disabilities Education Act*, 28 J. SPECIAL EDUC. LEADERSHIP 3 (2015); Thomas A. Mayes et al., *Allocating the Burden of Proof Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27 (2005); James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999); Perry A. Zirkel, *Judicial Appeals for Hearing/Review Officer Decisions Under IDEA: An Empirical Analysis*, 78 EXCEPTIONAL CHILD. 375 (2012); Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. 401 (2006).

<sup>9</sup> See, e.g., BAR-LEV ET AL., *supra* note 6, at 3; Consortium for Appropriate Dispute Resolution in Special Education, FAMILIES AND SCHOOLS: RESOLVING DISPUTES THROUGH MEDIATION (2002), available at <https://files.eric.ed.gov/fulltext/ED471810.pdf> [hereinafter *CADRE*]; Edward Feinberg et al., *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education* (2002), available at <https://files.eric.ed.gov/fulltext/ED476294.pdf>; Hazelkorn et al., *supra* note 6, at 33. For a brief discussion of mediation in the child welfare context, see Donald N. Duquette, *Non-Adversarial Case Resolution*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 509 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010). Other attributes are described in the sources previously and *infra* notes 88, 96–112. Some authorities describe these attributes, but they are described on a linear continuum and there is no discussion about how the attributes interact with each other. See, e.g., Feinberg et al., *supra*, at 15.



## II. THE IDEA AND DISPUTE RESOLUTION

Since its enactment in 1975, the IDEA has contained procedural safeguards for parents or schools who are dissatisfied with the identification, evaluation, placement, or provision of FAPE for a child with a disability.<sup>10</sup> Those safeguards are included in the IDEA to protect the student's substantive right to a FAPE.<sup>11</sup> According to William Buss, "The primary purpose of due process is to improve the correctness of the decision being made."<sup>12</sup> The IDEA's three procedures are (1) due process complaints, (2) complaints to the state department of education, and (3) mediation.<sup>13</sup> Although due process complaints and due process hearings "are the primary mechanism for dispute resolution"<sup>14</sup> under the IDEA, the IDEA expresses a preference for mediation.<sup>15</sup> Mediation was added to the statute in 1997<sup>16</sup> and is available in conjunction with a due process complaint<sup>17</sup> or state complaint,<sup>18</sup> or as a standalone procedure.<sup>19</sup> In addition to mediation, states and school districts offer other opportunities for parties to resolve their disputes, such as facilitated IEP meetings or local mediation offered by an intermediate agency.<sup>20</sup>

Mediation is an essential part of the IDEA's dispute resolution array of options.<sup>21</sup> Thus, the issue is maximizing mediation's use, and doing so by the parties for whom mediation is most suited. In the literature describing the IDEA's dispute resolution process, mediation and other alternatives to due

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<sup>10</sup> See, e.g., Zirkel & McGuire, *supra* note 5.

<sup>11</sup> Rowley, 458 U.S. at 205–06.

<sup>12</sup> William Buss, *What Procedural Due Process Means to a School Psychologist: A Dialogue*, 13 J. SCH. PSYCH. 298, 308 (1975).

<sup>13</sup> See, e.g., Zirkel & McGuire, *supra* note 5.

<sup>14</sup> Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers Under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries*, 83 N.D.L. REV. 109, 109 (2007).

<sup>15</sup> Feinberg et al., *supra* note 9, at 7; Branda L. Nowell & Deborah A. Salem, *The Impact of Special Education Mediation on Parent-School Relationships*, 28 REMEDIAL & SPECIAL EDUC. 304, 305 (2007).

<sup>16</sup> See, e.g., Feinberg et al., *supra* note 9, at 7–8; Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice*, 8 HARV. NEGOT. L. REV. 201, 203–04 (2003). Several states had adopted mediation prior to the 1997 IDEA amendments. See, e.g., Feinberg et al., *supra* note 9, at 7.

<sup>17</sup> 20 U.S.C. § 1415(f)(1)(B)(iv).

<sup>18</sup> 34 C.F.R. § 300.151–300.152(a)(3)(ii).

<sup>19</sup> 20 U.S.C. § 1415(e).

<sup>20</sup> Feinberg et al., *supra* note 9, at 23; see also Tracy Gershwin Mueller, *Litigation and Special Education: The Past, Present, and Future Direction of Resolving Conflicts Between Parents and School Districts*, 26 J. DISABILITY POL'Y STUD. 135 (2015); McMurtrey, *supra* note 5, at 189.

<sup>21</sup> See *supra* notes 6, 15–20 and accompanying text.

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process are often described as less adversarial than due process hearings. This decreased amount of “adversariness” is typically a selling point for mediation.<sup>22</sup> There are two issues with this selling point. First, it is not universally true. Based on local legal culture and norms,<sup>23</sup> the artistry of the mediator or hearing officer, and the attitudes and skills of the parties and counsel,<sup>24</sup> a randomly selected mediation may be more adversarial than a randomly selected due process hearing. Second, this selling point is not a sufficient motivator for all parents and school officials. This is simply based on the variability of human nature and of the dispute process. Disputes are multifactored and multifaceted and dispute resolution is a cognitively complex activity.<sup>25</sup> For some parents and school officials, this actual or perceived lesser degree of adversariness is a substantial benefit and usually all that is required to encourage them to give mediation a try. For other parents and school officials, however, the degree of adversariness is a secondary consideration or an irrelevant consideration. For some parents, the attributes that make due process hearings adversarial are attributes necessary to protect those parents’ interests: the nature of the dispute or the power imbalance between the parties may make mediation inappropriate.<sup>26</sup> For some parents and school officials,

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<sup>22</sup> See *supra* note 9.

<sup>23</sup> See generally Sandra L. Earnest, *An Exploration of Factors Relating to Variation Among States in the Frequency of Due Process Hearings* (1999) (unpublished Ed.D. dissertation, University of Tennessee) (on file with author).

<sup>24</sup> See, e.g., D’Alo, *supra* note 16, at 229–37 (describing attributes of mediator); Nowell & Salem, *supra* note 15, at 305 (describing effectiveness of mediator at improving relationships). For information regarding attorney involvement in due process hearings, see Buss, *supra* note 12, at 303 (“The presence of a lawyer does not create the adversity. In fact, there is a very good chance that most reasonably competent lawyers will reduce the element of hostility or antagonism that is inevitably present in such a situation.”) See Feinberg et al., *supra* note 9, at 9 (making the same “mixed bag” point about attorney involvement in mediation).

<sup>25</sup> See generally William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming...*, 15 L. & SOC’Y REV. 631 (1980–1981).

<sup>26</sup> See, e.g., JENNIFER G. BEER ET AL., *THE MEDIATOR’S HANDBOOK* 15 (4th ed. 2012); Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611 (2017); 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, 42 (1997); see also, e.g., Duquette, *supra* note 9, at 522–23 (stating mediation is inappropriate in child welfare cases where child safety or parent rights would be compromised); Dewey Cornell & Susan P. Limber, *Law and Policy on the Concept of Bullying in School*, 70 AM. PSYCHOLOGIST 333 (2015) (stating mediation is unsuited for bullying); Elizabeth Englander, *Is Bullying a Junior Hate Crime? Implications for Interventions*, 51 AM. BEHAV. SCIENTIST 205 (2007) (same); Jon M. Philipson, *The Kids Are Not All Right: Mandating Peer Mediation as a Proactive Anti-Bullying Measure in Schools*, 14 CARDOZO J. CONFLICT RESOL. 81 (2012) (stating while peer mediation is not suitable to resolve bullying, it may be useful to prevent bullying);



adversarial processes are not to be avoided, because the adversarial process may gratify a need that is deeper than the need for resolving a dispute, such as the need for attention or the need to inflict pain.<sup>27</sup> Some parties are so invested in a dispute that they have no interest in resolving it.<sup>28</sup> Finally, for some parents and school officials, being adversity-adverse may lead the parties to avoid the optimal resolution option for the particular dispute.<sup>29</sup>

### III. DISPUTE RESOLUTION, CONTROL, AND FINALITY

Because persons may have differing motives for engaging in mediation or other dispute resolution options, any explanation needs to be multi-factored to be thorough. Rather than a one-dimensional, linear progression with mediation and due process complaints on opposite poles of adversariness, I have used a two-dimensional approach to explain dispute resolution options. The x-axis is finality, from low finality to high finality. The y-axis is control, from low control to high control. These two axes can be placed on a two-by-two grid, which is set forth in Appendix A.

I have explained these processes to parents, educators, and attorneys, and all audiences recognize that finality and control are both powerful human motivators. Persons want control over their environment<sup>30</sup> and the ability to make decisions.<sup>31</sup> A lack of decisionmaking control is one cause of disputes and of the difficulty in resolving them.<sup>32</sup> Persons also want stability, predictability, or finality in their environment.<sup>33</sup> Control and stability are sometimes incompatible or unattainable at the same time. Also, people naturally have different tolerances for lack of control and lack of stability, as well as having different preferences between control and stability. All things being equal, however, the optimal state for dispute resolution processes is high

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Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253 (stating careful screening is required when referring family law cases involving domestic abuse to mediation).

<sup>27</sup> BEER ET AL., *supra* note 26, at 87 (“[C]onflict is a way to gain resources and social status, to feel . . . strong, to take pleasure in one’s power.”); D’Alo, *supra* note 16, at 208.

<sup>28</sup> *Id.* at 136. BAR-LEV ET AL., *supra* note 6, at 3 (“If reasonable discussion is not possible, mediation may not be the answer.”).

<sup>29</sup> PAM WRIGHT & PETE WRIGHT, *FROM EMOTIONS TO ADVOCACY: THE SPECIAL EDUCATION SURVIVAL GUIDE* 37–38 (2d ed. 2006).

<sup>30</sup> Kennon M. Sheldon et al., *What Is Satisfying About Satisfying Events? Testing 10 Candidate Psychological Needs*, 80 J. PERSONALITY & SOC. PSYCH. 325, 328 (2001).

<sup>31</sup> ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 15–21, 72–93 (2005); Sheldon et al., *supra* note 30, at 328.

<sup>32</sup> FISHER & SHAPIRO, *supra* note 31, at 15–21, 72–93.

<sup>33</sup> Sheldon et al., *supra* note 30, at 328.

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control and high finality. How do we get there and what does that look like in the special education dispute resolution toolbox?

Let us start first with *low finality and high control*. This quadrant is occupied by the mediation process. Mediation is purely a voluntary process.<sup>34</sup> Parties need not mediate at all, or they may agree to restrict mediation to certain issues. The parties are in control of the offers made during mediation and whether to accept or reject.<sup>35</sup> The mediator cannot compel parties to accept or reject settlement or agreement terms.<sup>36</sup> Since the parties are in control of the process, this is high control.<sup>37</sup> During mediation, parties “speak for themselves, think for themselves, and decide for themselves.”<sup>38</sup> However, since the mediation process does not have a guaranteed outcome, it is low finality. Since the process is low finality and does not have a guaranteed outcome, this quadrant in the grid is unstable and impermanent. The parties stay in this lower-right quadrant until they either: (1) agree to resolve their dispute or (2) agree to abandon mediation. They cannot stay in this quadrant forever.

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<sup>34</sup> See, e.g., BEER ET AL., *supra* note 26, at 3; KATHY DOMENICI & STEPHEN W. LITTLEJOHN, *MEDIATION: EMPOWERMENT IN CONFLICT MANAGEMENT* 3, 31 (2d ed. 2001); MARY GREENWOOD, *HOW TO MEDIATE LIKE A PRO* 1, 13 (2008); TONY WHATLING, *MEDIATION SKILLS AND STRATEGIES: A PRACTICAL GUIDE* 22, 38 (2012); *CADRE*, *supra* note 9, at 2; Hazelkorn et al., *supra* note 6, at 36; Antonis Katsiyannis & Maria Herbst, *Minimize Litigation in Special Education*, 40 *INTERVENTION IN SCH. & CLINIC* 106, 108 (2004); McMurtrey, *supra* note 5, at 191; see also Paul Steven Miller, *A Just Alternative or Just an Alternative? Mediation and the Americans with Disabilities Act*, 62 *OHIO ST. L.J.* 11, 13 (2001); see also 20 U.S.C. § 1415(e)(2)(B) (stating the IDEA allows districts to establish procedures that parents may be required to discuss the benefits of mediation; however, parents may not be required to participate in mediation).

<sup>35</sup> BEER ET AL., *supra* note 26, at 70; DOMENICI & LITTLEJOHN, *supra* note 34, at 32; GREENWOOD, *supra* note 34, at 12–13; BAR-LEV ET AL., *supra* note 6, at 3; Feinberg et al., *supra* note 9, at 8; Miller, *supra* note 34, at 13–14.

<sup>36</sup> BEER ET AL., *supra* note 26, at 35; GREENWOOD, *supra* note 34, at 30, 37; BAR-LEV ET AL., *supra* note 6, at 3; *CADRE*, *supra* note 9, at 2; Miller, *supra* note 34, at 13. GREENWOOD, *supra* note 34, at 21–22 (explaining while some mediators do not impose decisions on the parties, the mediation literature recognizes a limited role for the mediator to comment on the merits of an agreement, such by providing a “reality check” to the parties); BEER ET AL., *supra* note 26, at 67 (stating this role is also referred to as the “agent of reality”); BEER ET AL., *supra* note 26, at 66 (by commenting on the feasibility of a proposed or final agreement); GREENWOOD, *supra* note 34, at 24 (by serving as “devil’s advocate”). Feinberg et al., *supra* note 9, at 25–26 (stating this more evaluative role of the mediator is similar to points on the special education dispute resolution continuum); see also D’Alo, *supra* note 16, at 205 (discussing the evaluative style of mediation).

<sup>37</sup> Moses & Hedeem, *supra* note 6, at 5 (“The parents and educators [involved in mediation] retained control over [the child’s] educational program.”); see generally DOMENICI & LITTLEJOHN, *supra* note 34, at 3.

<sup>38</sup> BEER ET AL., *supra* note 26, at 10.



Diagonally above low finality and high control is *high finality and low control*. This quadrant is occupied by due process hearings.<sup>39</sup> In this quadrant, the dispute is presented to a hearing officer, who will hear testimony, review exhibits, and consider legal arguments.<sup>40</sup> After doing so, the hearing officer will render a decision.<sup>41</sup> The decision is made by a stranger to the dispute, not by the parties to the dispute. The parties have surrendered control to the hearing officer.<sup>42</sup> Rather than being the authors of the outcome, the parties, by invoking due process, relegate themselves to being influencers of the outcome.<sup>43</sup> By turning the dispute over to a hearing officer, the parties have introduced a variable into the dispute that is entirely outside of their control: “the life experiences” and “beliefs and opinions” of the decisionmaker.<sup>44</sup> The parties have turned their dispute over to the “vagaries . . . and unpredictability” of turning the resolution of a dispute over to a fact-finder.<sup>45</sup> While the party filing the due process complaint takes a measure of “control” by summoning the parties before the hearing officer,<sup>46</sup> the hearing officer retains control of the ultimate question. For this reason, due process hearings are low control. Because a hearing officer makes a “final”<sup>47</sup> decision for the parties rather than proctoring a discussion between the parties, a due process decision is high finality.<sup>48</sup> While the parties have statutory appeal rights from adverse due process hearing decisions,<sup>49</sup> that appeal is not a second bite at the

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<sup>39</sup> 20 U.S.C. § 1415(b)(2), (c)(2), (f)–(j).

<sup>40</sup> *Id.* § 1415(f)(2), (h)(2)–(3).

<sup>41</sup> *Id.* § 1415(f)(3)(E), (h)(4).

<sup>42</sup> GREENWOOD, *supra* note 34, at 51; *see also* BAR-LEV ET AL., *supra* note 6, at 2 (“In due process hearings, a third party neutral imposes an outcome on the participants that one or both may be unhappy with.”); McMurtrey, *supra* note 5, at 193 (stating due process hearing decisions are “binding”).

<sup>43</sup> For a brief discussion of the parties as influencers of due process outcomes, *see* Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILD. 546, 547 (1991).

<sup>44</sup> WRIGHT & WRIGHT, *supra* note 29, at 151. *See* Buss, *supra* note 12, at 304 (stating every hearing officer has a background in special education and in life, so the notion of “dead-centered impartiality” is a myth); Maher & Zirkel, *supra* note 14 (stating the question is whether the hearing officer is sufficiently impartial to render a fair and defensible decision); *see generally* Thomas A. Mayes, *Protecting the Administrative Judiciary from External Pressures: A Call for Vigilance*, 60 DRAKE L. REV. 827 (2012).

<sup>45</sup> Miller, *supra* note 34, at 14; *see also* Zylstra, *supra* note 26, at 260 (stating there is a greater “loss of control” in litigation than in mediation).

<sup>46</sup> Goldberg & Kuriloff, *supra* note 43, at 554.

<sup>47</sup> 20 U.S.C. § 1415(i)(1)(A).

<sup>48</sup> *Id.* § 1415(f)(3)(E), (h)(4); *see also* Perry A. Zirkel, “Finality” Under the Individuals with Disabilities Education Act: Its Meaning and Implications, 289 EDUC. L. REP. 27 (2013).

<sup>49</sup> 20 U.S.C. § 1415(i)(2).



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apple. Reviewing courts must give “due weight”<sup>50</sup> to decisions made by hearing officers,<sup>51</sup> and there is a large amount of outcome stability on judicial review of hearing officer decisions.<sup>52</sup>

Also in the high finality and low control quadrant are IDEA state complaints.<sup>53</sup> The parties have even less control in the state complaint process because they do not have the detailed rights that parties have in due process hearings, such as the right to examine and cross-examine witnesses.<sup>54</sup> Any on-site investigation is in the discretion of the state agency;<sup>55</sup> therefore, it is probable that the state complaint investigator will make her decision without ever meeting the parents or the child.<sup>56</sup> Also, state complaint decisions are high finality. The IDEA regulations require the state education agency to investigate and issue a “final decision” concerning a state complaint.<sup>57</sup> The IDEA regulations do not provide for judicial review of a state complaint decision;<sup>58</sup> however, the parties may file a due process complaint<sup>59</sup> or seek judicial review if state law permits.<sup>60</sup>

The upper right quadrant is *high finality and high control*. That quadrant is occupied by mediation agreements. A mediation agreement is high control, because the parties have agreed to settle their disputes.<sup>61</sup> It is “acceptable to all parties”<sup>62</sup> (or at least more acceptable than either the status quo or the risk of putting the dispute before a fact-finder). The parties, having shifted from an “adversarial mode . . . to a cooperative mode,”<sup>63</sup> have agreed that the solution to their disputes lies within, and not in the hands of a third party. The parties jointly exercise “self-determination.”<sup>64</sup> The mediation agreement is also final because any mediation agreement reached under the IDEA is “legally binding”<sup>65</sup> and enforceable in any State court of competent

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<sup>50</sup> *Rowley*, 458 U.S. at 206.

<sup>51</sup> *Newcomer & Zirkel*, *supra* note 8, at 477.

<sup>52</sup> *Id.* at 474–75; Zirkel, *Judicial Appeals for Hearing/Review Officer Decisions Under IDEA: An Empirical Analysis*, *supra* note 8, at 381.

<sup>53</sup> 34 C.F.R. §§ 300.151–300.153.

<sup>54</sup> Compare *id.* (state complaint process) with 20 U.S.C. § 1415(h) (parties’ rights during due process hearings).

<sup>55</sup> 34 C.F.R. § 300.152(a)(1).

<sup>56</sup> *Moses & Hedeon*, *supra* note 6, at 5.

<sup>57</sup> 34 C.F.R. § 300.152(a)(5)(ii).

<sup>58</sup> *Id.* §§ 300.151–300.153; *Dispute Resolution Procedures*, *supra* note 5.

<sup>59</sup> *Dispute Resolution Procedures*, *supra* note 5.

<sup>60</sup> *Id.*; see also Zirkel, *supra* note 7, at 570.

<sup>61</sup> See, e.g., *Feinberg et al.*, *supra* note 9, at 8.

<sup>62</sup> *Miller*, *supra* note 34, at 13.

<sup>63</sup> *BEER ET AL.*, *supra* note 26, at 39.

<sup>64</sup> *GREENWOOD*, *supra* note 34, at 12–13.

<sup>65</sup> 20 U.S.C. § 1415(e)(2)(F).

jurisdiction or in a district court of the United States.”<sup>66</sup> The dispute has been resolved by the mediation agreement, and the grounds for setting aside a mediation agreement are narrow and (intentionally) difficult to meet.<sup>67</sup> While there may be questions about the implementation of the mediation agreement,<sup>68</sup> the agreement itself resolves the dispute.

The final quadrant is *low finality and low control*. This is where the parties are either at a standoff or are ignoring the dispute. At this point, no one has taken action to resolve the dispute, and this lack of action may be due to many reasons. The dispute may still be forming, or the parties may have different perceptions of its nature and severity.<sup>69</sup> The parties may conclude that allowing the dispute to exist is less costly or disruptive than any effort to resolve it. In that sense, time spent in this quadrant is not time wasted. If, however, the dispute is fully formed and displaces the time, talent, and effort of parents and educators to address the needs of a child with a disability, time spent in this quadrant can be toxic. It is a game of “chicken”<sup>70</sup>—a staring contest. The parties are engaging in “jockeying and gamesmanship.”<sup>71</sup> The parties are waiting each other out: “Maybe he’ll drop out.” “Maybe they’ll move.” “Maybe I’ll homeschool my child.” “Maybe the school psychologist will request a transfer.” “Maybe the school board will not renew the superintendent’s contract.”

In those cases, the toxic, relationship-corroding trench warfare is low control. Each party is foregoing the ability to proactively participate in solution finding. Each party is turning the outcome entirely over to the other party or to an occurrence completely external to the dispute: “Maybe he’ll drop out, but maybe he won’t.” “Maybe they’ll move, but maybe they won’t.” “Maybe I’ll homeschool, but maybe I won’t have the time and resources to do it.” “Maybe the school psychologist will transfer, but if there are reductions in force she may be back.” “Maybe the superintendent’s contract is not renewed, but her successor is even less amenable to our position.” It is thus also low

<sup>66</sup> *Id.* § 1415(e)(2)(F)(iii).

<sup>67</sup> See generally James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509 (2004).

<sup>68</sup> 20 U.S.C. § 1415(e)(2)(F)(iii). A school’s failure to implement a mediation agreement is one key reason why parents may be dissatisfied with the mediation process. See, e.g., Nowell & Salem, *supra* note 15, at 312.

<sup>69</sup> See generally Felstiner et al., *supra* note 25; see also DOMENICI & LITTLEJOHN, *supra* note 34, at 119 (noting that some parties “do not want to resolve their problems”).

<sup>70</sup> See Mayes et al., *supra* note 8, at 84–85 (describing parties not wanting to file a due process complaint because the filing party would then be assigned the burden of proof).

<sup>71</sup> *Id.*



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finality because it lasts so long as neither party is willing to act. Until a party acts, the parties remain, on an emotional level, gravitationally bound and tidally locked. The parties cannot stay in this quadrant forever, as the statute of limitations will run at some point.<sup>72</sup>

There are two more entries needed in this grid based on the 2004 IDEA amendments. These amendments added a “resolution session” requirement prior to a hearing on a due process complaint filed by a parent.<sup>73</sup> The resolution session is an “intermediary step”<sup>74</sup> before a due process hearing. Before a hearing on the parent’s due process complaint, the IDEA requires the school district to offer a resolution session in which parents can participate.<sup>75</sup> At the resolution session, the parents describe the nature and facts of their dispute, and the public agencies have “an opportunity to resolve the complaint.”<sup>76</sup> If the parties resolve their dispute at the resolution session “to the satisfaction of the parents,”<sup>77</sup> the parties enter into a legally binding agreement,<sup>78</sup> which, unlike mediation agreements, may be revoked within three business days.<sup>79</sup> The parties may agree to waive the resolution session, or use mediation instead.<sup>80</sup> Furthermore, mediation remains available even after the conclusion of a resolution session in which no agreement was reached.<sup>81</sup> Resolution sessions are, like the mediation process,<sup>82</sup> high control but low finality. Even though the parties are required to be at the resolution session and participate, unless waived,<sup>83</sup> there is no requirement that an agreement be reached nor that any agreement be “to the satisfaction of the parents.”<sup>84</sup> The parties retain control over whether to resolve the dispute. A

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<sup>72</sup> 20 U.S.C. § 1415(b)(6)(B), 1415(f)(3)(C)–(D) (due process complaints); 34 C.F.R. § 300.153(c) (IDEA state complaints); see Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings Under the Individuals with Disabilities Education Act*, 35 J. NAT’L ASS’N ADMIN. L. JUDICIARY 305 (2016) (discussing statute of limitations for due process complaints).

<sup>73</sup> 20 U.S.C. § 1415(f)(1)(B); Allan G. Osborne & Charles J. Russo, *Resolution Sessions Under the IDEA: Are They Mandatory?*, 218 EDUC. L. REP. 7, 8 (2007).

<sup>74</sup> Hazelkorn et al., *supra* note 6, at 33.

<sup>75</sup> 20 U.S.C. § 1415(f)(1)(B).

<sup>76</sup> *Id.* § 1415(f)(1)(B)(i).

<sup>77</sup> *Id.* § 1415(f)(1)(B)(ii).

<sup>78</sup> *Id.* § 1415(f)(1)(B)(iii).

<sup>79</sup> Compare *id.* § 1415(f)(1)(B)(iv) (resolution agreement is voidable within 3 business days), with *id.* § 1415(e)(2)(F) (no similar provision for mediation agreements).

<sup>80</sup> *Id.* § 1415(f)(1)(B)(i).

<sup>81</sup> *Dispute Resolution Procedures*, *supra* note 5.

<sup>82</sup> See *supra* notes 34–38 and accompanying text.

<sup>83</sup> 20 U.S.C. § 1415(f)(1)(B)(i)(IV). Even though participation is mandatory, that does not change the ultimate voluntary character of the resolution session. See, e.g., BEER ET AL., *supra* note 26, at 17.

<sup>84</sup> 20 U.S.C. § 1415(f)(1)(B)(ii).

resolution agreement, like a mediation agreement,<sup>85</sup> is high finality and high control, although slightly less so. The parties enter into a “legally binding” agreement, albeit one that is voidable for three business days.<sup>86</sup>

#### IV. SELECTING THE MOST SUITABLE OPTION BY SELECTING THE MOST SUITABLE QUADRANT

The value of this framework is its multidimensionality. Rather than a unidimensional approach to a dispute resolution continuum, this framework illustrates the complexity of disputes and of dispute resolution. This framework’s value is judged based on its utility: Does it help parties make better choices about which dispute resolution option to pursue, both initially and ultimately? Since control and finality are basic drivers of human behavior,<sup>87</sup> this framework is conceptually well suited to its task.

Now that the four quadrants have been identified, the parties may use their motivators and the motivators of their opposing parties to select the process to resolve their disputes (assuming they do not want to remain stuck in the lower left quadrant, admiring the problem). Further, attorneys and other dispute resolution professionals may use these quadrants to counsel clients about which approach is most suited to the client’s circumstances. If a party needs or values finality, that party should focus on the top row. If a party needs or wants control, that party should focus on the right column. If a party needs or wants both control and finality, the focus should be on the top right quadrant. If a party believes that the opposing party does not have sufficient trust to engage in voluntary mediation, the party may wish to offer mediation, but should not be surprised if mediation is initially rejected. To get into the top right quadrant (a mediation agreement), one must start in the bottom right quadrant (the mediation process). There are no shortcuts to the top right quadrant.

This brings up an important point about special education dispute resolution: the parties may move between the quadrants on this grid. The lines separating the quadrants are permeable. Just because the parties are in the due process quadrant (upper left) does not mean they cannot discuss settlement (lower right) at any time, and just because the parties want desperately to resolve the dispute voluntarily, there exists some disputes for which a due

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<sup>85</sup> See *supra* notes 61–68 and accompanying text.

<sup>86</sup> 20 U.S.C. § 1415(f)(1)(B)(iii)–(iv).

<sup>87</sup> See *supra* notes 30–33 and accompanying text.



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process decision is absolutely necessary, and other disputes for which filing a due process complaint is a necessary first step.<sup>88</sup>

For example, after a long exchange of e-mails and text messages with the other party about an IDEA-eligible child's reading goal and behavior goal, a party may request mediation, then be unable to settle, then file a due process complaint, then go to a resolution session, then be unable to settle, then prepare for the due process hearing, then engage in settlement discussions prior to hearing, then agree to continue the hearing to participate in the state's evaluative mediation program,<sup>89</sup> then settle the dispute on the behavior goal, and finally proceed for a hearing decision on the reading goal. This dispute has travelled through all four quadrants, including multiple stops in the lower right, low finality and high control, quadrant.

In another example, the parents of a child with autism and the child's public school disagree about goals and instructional methodology to take for that child.<sup>90</sup> The parents withdraw their child from the public school and enroll their child in a private school especially designed for children with autism.<sup>91</sup> The school offers IEPs annually, but the parents reject them. Two years later, the parents make a claim for two years of tuition reimbursement, arguing that the public school's proposed program violated the IDEA. The school refuses, and the parents file for due process. The school district and the parents reject mediation and are unable to arrive at a resolution during the resolution session. After due process, the administrative law judge orders reimbursement for one of two years, finding that the district violated the IDEA in only one of two years at issue. Both the school district and the parents appeal, and the federal

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<sup>88</sup> For example, if the limitations period is about to run, a party may file a due process complaint, preserve their claim, and proceed to mediation, to a resolution session, or to both. For more on the IDEA's limitations period, see Zirkel, *supra* note 72. For an additional example, a party may file a due process complaint to increase the likelihood of claiming attorney fees. For more on the IDEA's attorney fees provision as it relates to mediation, see Weber, *supra* note 6, at 656–62. Finally, if a party suspects judicial review might be possible, even if not likely or preferred, the party may select between the options in a way that is most likely to satisfy the IDEA's exhaustion requirement. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); Peter J. Maher, Note, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259 (2011).

<sup>89</sup> For discussion of this and similar options that many states have developed, see Feinberg et al., *supra* note 9, at 25–26.

<sup>90</sup> See generally Claire Maher Choutka et al., *The "Discrete Trials" of Applied Behavior Analysis for Children with Autism: Outcome-Related Factors in the Case Law*, 38 J. SPECIAL EDUC. 95 (2004).

<sup>91</sup> See generally Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001) (discussing law and outcomes for tuition reimbursement claims under the IDEA).

district court affirms the administrative law judge's decision in its entirety. The school district appeals; however, prior to the briefing, the appellate court orders a settlement conference before one of the court's staff attorneys.<sup>92</sup> At the settlement conference, the parties agree to implementation of the administrative law judge's decision, and the school district agrees to payment of a portion of the parents' trial and appellate attorney fees. This dispute remained in the high finality-low control quadrant until after the district court's decision. Only after that point, and only after the risks of continued litigation became clear, did it make sense for the parties to discuss settlement. Once they did, they were able to move one quadrant to the right and achieve high finality and high control. Neither party attained everything they wanted, but they got something of value and were able to bring their dispute to a voluntary resolution.

Special education is a discipline characterized by indeterminacy.<sup>93</sup> Parents and school officials may have different perspectives on the child.<sup>94</sup> A parent's views on the child's education may be disregarded by school officials;<sup>95</sup> however, school officials are also "subject to error and conflict of interest."<sup>96</sup> If the "gap"<sup>97</sup> between those divergent views is not narrowed, due process may be necessary. According to Bar-Lev and colleagues, "It must also be acknowledged that sometimes, reasonable people may truly care about a child's needs yet disagree about how to meet those needs, and may require the definitive resolution of a hearing decision."<sup>98</sup>

In addition to being high control and high finality, there are other benefits of mediation.<sup>99</sup> Mediation is, as a general rule, less costly than a due process hearing.<sup>100</sup> As a general rule, mediation is also faster and less time-

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<sup>92</sup> FED. R. APP. P. 33.

<sup>93</sup> See, e.g., Mayes et al., *supra* note 8, at 80.

<sup>94</sup> WRIGHT & WRIGHT, *supra* note 29, at 44; see also JOHN REIMAN ET AL., INITIAL REVIEW OF RESEARCH LITERATURE ON APPROPRIATE DISPUTE RESOLUTION (ADR) IN SPECIAL EDUCATION 6 (2007), available at <https://files.eric.ed.gov/fulltext/ED498823.pdf>.

<sup>95</sup> WRIGHT & WRIGHT, *supra* note 29, at 44.

<sup>96</sup> Buss, *supra* note 12, at 300.

<sup>97</sup> WRIGHT & WRIGHT, *supra* note 29, at 44.

<sup>98</sup> BAR-LEV ET AL., *supra* note 6, at 3. The parties may be too entrenched in their positions for mediation to be of benefit. DOMENICI & LITTLEJOHN, *supra* note 34, at 119. Even if this is the case, Bar-Lev and colleagues state that mediation has "significant benefits." BAR-LEV ET AL., *supra* note 6, at 3.

<sup>99</sup> These benefits may be considered in addition to the grid in Appendix A, or they may be as one of the axes used to construct an alternate grid.

<sup>100</sup> See, e.g., BAR-LEV ET AL., *supra* note 6, at 1; CADRE, *supra* note 9, at 2; DOMENICI & LITTLEJOHN, *supra* note 34, at 4; Feinberg et al., *supra* note 9, at 6; REIMAN ET AL., *supra* note 94, at 3; WRIGHT & WRIGHT, *supra* note 29, at 43-44; D'Alo, *supra* note 16, at 204;



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consuming.<sup>101</sup> Additionally, mediation is more likely to preserve or improve relationships,<sup>102</sup> to improve communications,<sup>103</sup> and to cause less emotional harm<sup>104</sup> than a hearing. One of the reasons that this is so is because the mediation process is an opportunity to improve trust between the parties.<sup>105</sup> This cannot help but lead to improved outcomes: distrust is one of the key causes of disputes.<sup>106</sup>

The emotional redirection that can occur in mediation is one of the reasons it has such potential. The shift from “establishing blame and finding fault”<sup>107</sup> to “joint problem-solving”<sup>108</sup> and “creative solutions”<sup>109</sup> provides a space for the parties to restore and improve relationships. The focus is on having a discussion, rather than offering testimony.<sup>110</sup> Further, the shift from a “win-lose”<sup>111</sup> mentality to a “win-win”<sup>112</sup> mentality encourages resolution by allowing one or more of the parties to “save face.”<sup>113</sup> Fisher and Shapiro

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Hazelkorn et al., *supra* note 6, at 33; Kuriloff & Goldberg, *supra* note 26, at 42; Moses & Hedeem, *supra* note 6, at 5; McMurtrey, *supra* note 5, at 192.

<sup>101</sup> See, e.g., DOMENICI & LITTLEJOHN, *supra* note 34, at 4; Feinberg et al., *supra* note 9, at 6; D’Alo, *supra* note 16, at 204; Hazelkorn et al., *supra* note 6, at 33, 36; McMurtrey, *supra* note 5, at 193.

<sup>102</sup> See, e.g., DOMENICI & LITTLEJOHN, *supra* note 34, at 37; Feinberg et al., *supra* note 9, at 8; WRIGHT & WRIGHT, *supra* note 29, at 190; Hazelkorn et al., *supra* note 6, at 33; Moses & Hedeem, *supra* note 6, at 5; McMurtrey, *supra* note 5, at 194; see also Newcomer & Zirkel, *supra* note 8, at 479 (“Relationships between parents and districts that are fractured by the adversarial system bode ill for a successful team approach, over a period of years, to educate a student with disabilities.”). Even if positive interactions do not increase, mediation may decrease negative parent-school interactions. See, e.g., Nowell & Salem, *supra* note 15, at 308.

<sup>103</sup> See, e.g., BAR-LEV ET AL., *supra* note 6, at 2; CADRE, *supra* note 9, at 2; Hazelkorn et al., *supra* note 6, at 36; Zirkel & McGuire, *supra* note 5, at 110.

<sup>104</sup> See, e.g., Feinberg et al., *supra* note 9, at 3, 14; REIMAN ET AL., *supra* note 94, at 3; Kuriloff & Goldberg, *supra* note 26, at 42; Moses & Hedeem, *supra* note 6, at 5; Newcomer & Zirkel, *supra* note 8, at 479.

<sup>105</sup> Zirkel & McGuire, *supra* note 5, at 110.

<sup>106</sup> Mayes et al., *supra* note 8, at 78; see also WRIGHT & WRIGHT, *supra* note 29, at 49.

<sup>107</sup> BAR-LEV ET AL., *supra* note 6, at 2; see also DOMENICI & LITTLEJOHN, *supra* note 34, at 2 (stating mediation is not “a contest” and not “to find out who is right”).

<sup>108</sup> Kuriloff & Goldberg, *supra* note 26, at 44.

<sup>109</sup> BAR-LEV ET AL., *supra* note 6, at 2; see also WRIGHT & WRIGHT, *supra* note 29, at 190 (importance of developing solutions).

<sup>110</sup> Hazelkorn et al., *supra* note 6, at 33.

<sup>111</sup> See, e.g., BAR-LEV ET AL., *supra* note 6, at 2; WRIGHT & WRIGHT, *supra* note 29, at 50.

<sup>112</sup> See, e.g., WRIGHT & WRIGHT, *supra* note 29, at 190.

<sup>113</sup> *Id.* at 50; accord WHATLING, *supra* note 34, at 157; see also DOMENICI & LITTLEJOHN, *supra* note 34, at 55–61 (discussing “face management”).

elaborate on the importance of saving face, which they conceptualize as recognizing and valuing status.<sup>114</sup> A person whose status is acknowledged, even while that person is being asked to change beliefs or behaviors, is much more likely to agree to a solution to a dispute than a person whose status (as a skilled teacher, as a dedicated school leader, as a caring and involved parent, etc.) is under attack.<sup>115</sup>

The preceding attributes of mediation result in other gains. Parties who resolve their disputes by mediation are less likely to see their disputes recur.<sup>116</sup> Further, Moses and Hedeon note that mediation results in “improved progress of children in schools.”<sup>117</sup>

Finally, even if mediation does not result in an agreement, it still has measurable positive effects. It opens communication and is a first step toward rebuilding trust. By agreeing to mediate, a party—even when agreeing reluctantly—shows the other parties that the place and time for trust and dialogue is here and now. Further, parties to mediation discussions report “emotional relief”<sup>118</sup> even when no agreement is made, and the mediation process is still beneficial because of the assertion of self-determination.<sup>119</sup>

## V. CONCLUSION

Given that most persons value both finality and control,<sup>120</sup> and assuming they have a shared genuine interest in resolving the dispute at issue,<sup>121</sup> it makes rational sense to attempt mediation. While the mediation process is not perfect<sup>122</sup> and is not for all situations,<sup>123</sup> the upside for mediation—in gratifying basic human needs (particularly the need to be heard and have some control), in preserving educational and emotional resources,

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<sup>114</sup> FISHER & SHAPIRO, *supra* note 31, at 15–21, 94–114.

<sup>115</sup> See *supra* notes 108–14 and accompanying text.

<sup>116</sup> REIMAN ET AL., *supra* note 94, at 3.

<sup>117</sup> Moses & Hedeon, *supra* note 6, at 5; see also Nowell & Salem, *supra* note 15, at 304 (“Protecting and developing positive collaborative relationships between parents and schools has empirically been found to be a key element in the success of special education programs, leading to improved educational and social outcomes for children and families”).

<sup>118</sup> BEER ET AL., *supra* note 26, at 4.

<sup>119</sup> *Id.* at 168. This is not to say that every unsuccessful mediation improves relationships, however. McMurtrey, *supra* note 5, at 192–93 (stating that mediations not resulting in agreements may lead to “awkward future . . . relationships”).

<sup>120</sup> See *supra* notes 30–33 and accompanying text.

<sup>121</sup> See *supra* note 27.

<sup>122</sup> See generally REIMAN ET AL., *supra* note 94; Delgado, *supra* note 26; Kuriloff & Goldberg, *supra* note 26; Nowell & Salem, *supra* note 15; Weber, *supra* note 6.

<sup>123</sup> See *supra* notes 26–29, 88, 98 and accompanying text.



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and in improving relationships and educational outcomes—justifies spending at least some time in the lower right quadrant in hopes of attaining a high control-high finality outcome.

APPENDIX A: DISPUTE RESOLUTION OPTIONS

<p><b>HIGH FINALITY-LOW CONTROL</b><sup>124</sup></p> <p><u>Due Process Complaints/Hearings</u></p> <p>IDEA State Complaints</p>	<p><b>HIGH FINALITY-HIGH CONTROL</b><sup>125</sup></p> <p><u>Mediation Agreements</u></p> <p>Resolution Session <i>Agreements</i></p>
<p><b>LOW FINALITY-LOW CONTROL</b><sup>126</sup></p> <p>Impasse Waiting Game</p>	<p><b>LOW FINALITY-HIGH CONTROL</b><sup>127</sup></p> <p><u>Mediation Process</u></p> <p>Resolution <i>Sessions</i></p>

<sup>124</sup> See *supra* notes 39–60 and accompanying text.

<sup>125</sup> See *supra* notes 61–68, 85–86 and accompanying text.

<sup>126</sup> See *supra* notes 69–72 and accompanying text.

<sup>127</sup> See *supra* notes 34–38, 82–84 and accompanying text.



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