NO LONGER LEFT TO THEIR OWN DEVICES: UTILIZING AND FACILITATING MEDIATION TO GIVE STUDENTS ACCESS TO ASSISTIVE TECHNOLOGY

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I. INTRODUCTION AND ROADMAP

Technology plays an increasingly important role in the education of children with disabilities.1 Advances in tactile interfacing devices—most commonly seen in tablet computers, such as the iPad—have allowed students on the autism spectrum to communicate and interact more easily with their peers.2 Educators can repurpose everyday technologies like online chat communication3 and cell phones4 to enrich student engagement without the stigma, which past devices specifically designed for students with disabilities usually carried.5

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1 Trisha O’Connell, Geoff Freed, & Madeline Rothberg, Carl and Ruth Shapiro Family National Center for Accessible Media WGBH Educational Foundation, Using Apple Technology to Support Learning for Students with Sensory and Learning Disabilities 4 (2010) (noting that “new technology uses and educational applications specifically for students with disabilities emerge daily from researchers, curriculum developers, teachers, parents—and even students themselves”).


5 Id.
While legislators have long been aware of the important role technology plays in these students’ lives, the law frequently proves ineffective at delivering to students beneficial devices and services. For many years, parents who were upset about school districts’ level of technological assistance—or about any determination regarding their child’s special education, for that matter—were limited to an adversarial fair-hearing process; it was only in 2005 that mediation became a viable alternative. While mediation of such challenges has been a hot topic in legal literature over the last few years, the discussion has failed to focus on the particular salience mediation offers in resolving conflicts where assistive technology (“AT”), is concerned.

This Note seeks to fill that void by examining the unique role AT plays in a student’s development and how mediation succeeds (and fails) in helping the student secure desired equipment and services. Part II of this Note examines the background law and facts governing the dissemination of AT devices and services and the mechanisms for resolving disputes surrounding that dissemination. Part III provides an illustrative example to demonstrate the complex legal issues that arise in the determination of technology appropriate for students with disabilities.

Part IV then examines why mediation offers a superior mode of resolution to both parents and school districts when conflict over AT arises. Finally, Part V suggests how various stakeholders can better facilitate mediation through legislative and administrative reform. This analysis and discussion is tailored to the law and administration of special education services in New York State. However, advocates nationwide ought to be able to apply many of the principles and recommendations discussed herein.

II. BACKGROUND LAW AND INFORMATION

The federal Individuals with Disabilities Education Act (“IDEA”) provides that students with a disability are entitled to a

6 James R. Sheldon & Ronald M. Hager, Work, Assistive Technology and Transition-Aged Youth, NAT'L ASSISTIVE TECHNOLOGY ADVOCACY PROJECT PUBLICATION 2 (Oct. 2011) (indicating that, since 1988, a variety of legislation has enabled assistive technology).

7 See Hwa Lee & Rosalyn Templeton, Ensuring Equal Access to Technology: Providing Assistive Technology for Students with Disabilities, 47.3 THEORY INTO PRACTICE 212, 213 (2008) (noting the “the vagueness of the current laws and lack of clear, consistent guidelines on how the services should be provided.”).

free appropriate public education ("FAPE"). To make this type of education available, a school district must create and provide all students with disabilities with an Individualized Education Program ("IEP"). An IEP outlines the services and resources the school will provide to confer on the student an educational benefit. IDEA explicitly requires IEPs to consider the need for AT services and articulates a goal to provide students with disabilities a more meaningful education by means of technology. If a student’s parents find the AT assessment (or any other aspect of the IEP) unsatisfying, they are allowed to challenge it pursuant to IDEA’s procedural safeguards, which include administrative hearings, civil court appeals, and mediation.

Since the landmark 1982 Supreme Court decision of Board of Education v. Rowley, courts have held that Congress intended merely to confer a minimum level of educational benefit—"a basic floor of opportunity"—to students with disabilities. That interpretation also extends to legal challenges over AT. The application of this rule often results in children’s receiving lesser services that allow them to attain passing marks.

In the thirty years since Rowley, Congress has addressed the issue of technology in special education multiple times—through the 1988 "Tech Act," and later in three amendments to IDEA. However, none of this legislation has sought to provide more than the minimum level of opportunity to students with disabilities. Consequently, parents and school districts have fought tooth and nail over what level of AT the latter must provide to children with special needs when issuing IEPs to reach the “basic floor.”

IDEA also allows parties to seek mediation, regardless of whether either party has filed a complaint regarding a student’s IEP. The relevant provision requires that: consent be among the

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10 Id. at § 1414.
11 Id. at § 1414(d)(3)(B)(v).
12 Id. at § 1400(d)(3).
13 Id. at § 1415.
14 458 U.S. 176.
15 Id. at 201. See generally Ronald Hager, Funding of Assistive Technology through Special Education Programs: An Overview of a Special Education Program’s Obligation to Fund AT Devices and AT Services, Teleconference at Neighborhood Legal Services, Inc. (Apr. 19, 2012) (indicating that Rowley continues to serve as precedent).
16 Hager, supra note 15.
17 Id.
18 Id.
parties; mediation be “conducted by a qualified and impartial mediator who is trained in effective mediation techniques”; and the state maintain a list of qualified mediators.\textsuperscript{20} When the parties cannot agree to mediate, IDEA also allows either state or local education agencies to offer the services of a “disinterested party” who can explain the benefits and encourage the use of mediation.\textsuperscript{21} New York accomplishes this through a partnership with the non-profit New York State Dispute Resolution Association (“NYS-DRA”) and its Community Dispute Resolution Centers (“CDRCs”), whose mediators are trained in the laws and regulations governing special education and related services.\textsuperscript{22}

New York is home to a large population of students with disabilities.\textsuperscript{23} Each year, the state’s administrative courts, in addition to the New York District Courts and the Second Circuit, are burdened by great numbers of IEP challenges, many focusing on the level and quality of AT devices and services. IDEA allows litigants to bring their claims to federal court after exhausting the administrative review process at the state level;\textsuperscript{24} New York is one of several states that have a two-tiered administrative review, with challenges going first before a local hearing officer and then a state review officer.\textsuperscript{25}

In New York, an independent hearing officer (“IHO”) adjudicates the original challenge to an IEP. These officers are appointed—and compensated—by the local school board.\textsuperscript{26} If either party wishes to pursue a subsequent review, the state education department will then appoint a state review officer (“SRO”) to preside over the appeal.\textsuperscript{27} SROs utilize a \textit{de novo} standard of review, which allows for the discretionary modification of the determination while limiting the analysis to the record.\textsuperscript{28} Following exhaustion of these administrative reviews (or alternatively, a dem-
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In these cases, the district utilizes a “modified de novo” review—in effect, a review of the record with an even higher level of deference than the reviews below. This cumulative deference means that any bias from the initial review is unlikely to face severe scrutiny. Moreover, on review, courts look only for actual bias, rather than for the appearance of impropriety by a hearing officer, making decisions difficult to overturn on the basis of unfairness.

New York statutes offer little clarification on the IDEA standard of officer impartiality. The State’s Education Laws provide that a hearing officer cannot have worked for a school, district, or program that serves students with disabilities within the past two years. Beyond this provision, state regulations offer little elaboration on IDEA’s nebulous prohibition of review officers with “a personal or professional interest that conflicts with the person’s objectivity in the hearing.” According to a 1991 study, over twenty-five hearing officers listed school-district or Board of Cooperative Educational Services (“BOCES”) mailing addresses, and many more still were retired school administrators or BOCES officers. A study of IEP reviews in Pennsylvania, which also employs a two-tiered administrative review, found that school districts were significantly more likely to prevail when a hearing officer was a former school employee.

As this Note demonstrates in Section IV, mediation presents an opportunity for students and the parents of children with disabilities to avoid some of the unsavory complications that the administrative review process presents. For example, bias in mediation is much less common. Mediation also helps parties work around the notorious Rowley standard, giving students access to technology in a speedy, cheap, and collaborative manner.

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29 Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483, 488 (2d Cir. 2002) (The court “recognize[s] that the IDEA’s exhaustion requirement does not apply in situations in which exhaustion would be futile because administrative procedures do not provide adequate remedies.”).
32 Id. at 111, 114.
33 N.Y. EDUC. LAW § 4404(1)(c).
35 Lynch, supra note 26, at 190.
36 Maher & Zirkel, supra note 31, at 111.
districts also benefit by avoiding a costly review process and can help achieve better outcomes for their students. Third parties, such as policy makers and taxpayers, should also endorse mediation, particularly in the overburdened New York system, where the process presents an attractive alternative to resource-intensive litigation.

III. An Illustrative Example

Picture Ricky, Joey, and Lisa, three eleven-year-old children with identical hearing impairments. Federal law provides for the children to receive a free and appropriate public education, which includes access to sufficient AT. In the past, Ricky, Joey, and Lisa were able to rely on an FM hearing aid to amplify and transmit most of the conversation in the classroom. As they enter junior high school, however, the children, and their parents, are worried they will not be able to keep up with their classmates.

The school district shares some of their concerns and is willing to offer the children the use of a speech-to-text translation device. In issuing the students their IEPs, the school district offers the students the use of TypeWell, a transcription service that paraphrases the classroom conversation. However, the parents assert their beliefs that their children would be better served by a verbatim service such as communication access real-time translation ("CART") because they are concerned that TypeWell will "dumb-down" the classroom conversation.

In an attempt to receive these services, Ricky’s parents file a complaint to initiate an impartial due process hearing, asserting that the school’s IEP does not afford their son an appropriate public education. Joey’s parents decide to place him in a private

37 Monthly Spotlight, LEARNING DISABILITY ASS’N OF N.Y. STATE NEWSLETTER 1 (Feb. 2012) (noting that New York has over 6,000 annual fair hearing requests to be decided by 124 IHOs).
38 20 U.S.C. § 1400(c).
41 Id.
42 In re Parents on Behalf of Student v. Tustin Unified Sch. Dist., OAH CASE NO. 2009080029, Office of Administrative Hearings, State of California, 18 (June 1, 2010).
school that will offer the CART services. They also bring a complaint to initiate an impartial due process hearing to seek reimbursement for the private school tuition on the grounds that the private placement affords Joey an appropriate education, whereas the IEP does not. Lisa’s parents, on the other hand, decide to pursue mediation to resolve their dispute with the school district.

Ricky’s parents obtain legal representation in advance of a mandated resolution session, a hostile event during which the parties fail to come to an agreement. Following the unsuccessful session, Ricky’s parents file a due process complaint, and the parties have a fair hearing two weeks later. The local education agency randomly assigns John Johnson as the hearing officer. Johnson was a special education teacher in a nearby school district for twenty years. He has been retired for over ten years now and has not kept up with trends in AT. After the parties spend two days presenting evidence and multiple witnesses, Johnson rules that the IEP was appropriate. Ricky’s parents and their attorney immediately file an appeal with the state hearing officer.

At the next level of administrative hearing, Bill Williamson presides as SRO. Williamson is another former New York special education teacher who has been retired for many years and is not abreast of the newest AT developments. After a brief review, he affirms the first decision. Having exhausted the administrative review process, Ricky’s parents must now confront the possibility of taking their complaint to federal court. After a discussion with their attorney, they file a complaint in the Southern District of New York, alleging that the administrative hearing officers incorrectly determined that Ricky received an appropriate IEP, and also claiming that the fair hearings should be disqualified because the officers were biased.

A year goes by before the case gets into court. On review, the decision is based on the administrative record and nothing there

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44 Id. at § 1412.
45 Id. at § 1415(c).
46 N.Y. EDUC. LAW § 4404(1)(b) (McKinney 2007).
47 8 N.Y.C.R.R § 200.5.
48 Under New York Education Law § 4404, Johnson meets the minimum requirements for an impartial hearing officer. Moreover, an earlier yet still relevant study of hearing officers reveals that many hearing officers match the description of Johnson. See Lynch, supra note 26, at 190.
49 See generally NEW YORK LAWYERS FOR THE PUBLIC INTEREST, SPECIAL EDUCATION FACT SHEET: SPECIAL EDUCATION IMPARTIAL HEARINGS IN NEW YORK CITY (Jan. 2011).
50 N.Y. EDUC. LAW § 4404(2).
compels the District judge to reverse the administrative hearing decision. As for the issue of bias, the judge finds no evidence of actual bias to support the claim, which he thereafter dismisses. Ricky’s parents are now desperate for any relief, and appeal yet again—this time to the Second Circuit. After waiting yet another year, the court reaffirms the lower decisions. Almost three years later, Ricky’s parents have exhausted their appeals trying to get Ricky his CART services, with nothing to show for their efforts but a hefty bill for legal services.

Meanwhile, Joey is at least enjoying CART services at his new school, the tuition for which his parents had to take out a second mortgage on their home in order to afford. They consider the money well spent but are anxious to recoup the costs from the local school district. They, too, obtain legal representation and then initiate the due process proceedings under IDEA, attempting to show that their unilateral placement was appropriate. The school district contends that their original IEP was appropriate and private placement was therefore unnecessary.

For their hearing, Joey’s parents and the school district will go before Jenny Jenkins, yet another former educator in a state school district who has been out of teaching for many years. Like Ricky’s parents, Joey’s are unsuccessful in persuading the hearing officer and continue to launch one unsuccessful appeal after another. While in this case Joey has gotten his CART services and has been an “A” student at school, he is crossing his fingers for a full-ride scholarship to college, because his parents are on the brink of bankruptcy after having to pay their legal fees on top of private school tuition.

Contrast these unfortunate experiences with the path Lisa’s parents take. They request mediation, to which the school district agrees. Lisa’s parents are given a list of qualified mediators, from which they select Tom Thompson. Mr. Thompson has a law degree, as well as a Master’s in Special Education, and is familiar with current special education practices and the latest AT. During the mediation, Lisa’s parents and the school district engage in a non-confrontational discussion, and after just one day, they agree to a trial run of both the CART and TypeWell services.

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53 N.Y. EDUC. LAW § 4404(1)(b) (McKinney 2007).
55 Id. at § 1415(e)(C).
During the course of the trials, Lisa and her parents are in constant communication with the school district. In the end, Lisa prefers CART but is okay with TypeWell, and her performance using the latter is comparable. The school acknowledges Lisa’s preferences but notes the much larger cost of CART services. As a compromise, the parties agree to use a combination of CART and TypeWell services in Lisa’s classes so as to mitigate the variable costs of CART while ensuring her continued scholastic success.\footnote{TypeWell—Choosing A Service, TypeWell, http://typewell.com/alternatives.html (last visited May 22, 2013).}

Lisa, her parents, and the school district are all satisfied, have a great relationship, and have to pay but a small fraction of the costs that were involved in resolving each of Joey’s and Ricky’s disputes.

IV. Discussion

In this section, this Note argues that mediation is preferable to the fair-hearing process in resolving IEP disputes relating to AT for three main reasons. First, mediation offers faster resolution, meaning that more students will get AT in a timely manner and the parties will generally cut costs associated with the hearing process. Second, through mediation, parents and school districts can engage in a non-adversarial dialogue that leads to better outcomes for students. Finally, mediators are better incentivized to be knowledgeable about the latest AT and more likely to be impartial than the hearing officers who preside over due process hearings.

A. Mediation is a Cost-Effective and Expedient Manner of Resolution

Resolving a dispute over an IEP through IDEA’s fair-hearing process is a time-consuming and expensive ordeal. Going through the fair-hearing procedure and into federal court takes years and costs thousands of dollars. A 2005–2006 study found that the average hearing process costs between $50,000 and $100,000.\footnote{Tracy G. Mueller, IEP Facilitation: A Promising Approach to Resolving Conflicts between Families and Schools, 41.3 Teaching Exceptional Children 60, 61 (2009).} Moreover, litigating a claim through New York’s two-tiered
administrative review and into federal court can take upwards of four years.58

IDEA does offer one attempt to streamline this process: the mechanism of “unilateral placement.”59 The parents have the option to move the student, without prior consent from the school district, into a private school which offers the desired AT, and then subsequently bring a complaint under IDEA’s fair-hearing process to recoup the cost of tuition.60 However, many private schools require up-front payments and/or deposits, rendering this alternative impracticable for families that are unable to cover the cost independently.61 Even when parents who opt for this alternative can afford the up-front costs, they “do so at their own financial risk”62—they will still thereafter have the burden of demonstrating that private placement was appropriate.63

Furthermore, to successfully recoup tuition, IDEA requires a showing that the school district’s IEP was inappropriate;64 while New York statute has shifted the burden of proof to the school district,65 case law has demonstrated that this burden shifting has been anything but a panacea for parents in tuition-reimbursement cases. Moreover, after factoring in the cost of legal representation for the fair-hearing process, unilateral placement becomes an expensive and uncertain proposition. For these reasons, parents should not consider unilateral placement an acceptable alternative to mediation when trying to get AT in a timely manner.

School districts also have the incentive to attempt mediation in order to avoid unilateral placement. In the event the parents prevail in the fair-hearing process, the school district will be required to pay for the entire cost of the student’s private school tuition.66 The 1999–2000 Special Education Expenditure Project, a compre-
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hensive national study that the 1997 IDEA had mandated, found
the average annual cost of private placement was $25,580 per
student.

In 2010, New York City spent $116 million in litigation and
tuition expenses on over four-thousand unilateral placement
claims. Since legislators signed New York’s burden-shifting pro-
vision in 2007, the number of claims filed against the NYC Depart-
ment of Education (“DOE”) has risen by a third, and costs of
adjudicating these claims have more than doubled. While parents
may not always, or even frequently, win these claims, a lower bur-
den encourages parents to file suit—a phenomenon harmful not
just to the school districts that must litigate these claims, but also to
parents who put misguided hope into the fair-hearing process and
taxpayers who must ultimately bear the cost of litigation. Though
only a tiny fraction of students with disabilities seek private place-
ment, and the aforementioned costs represent but a sliver of the
DOE’s budget, the trend of increased claims and rising costs—a
trend that becomes particularly noticeable when one considers pri-
vate school tuition across the country—should give school dis-
tricts reason to be proactive about, or at least receptive to,
mediation as a means of avoiding costly unilateral placement.

Comparatively, mediation presents an inexpensive and expedi-
ent way to resolve IEP disputes. Prior to 1997, when Congress
passed the amendment to IDEA requiring states to offer media-
tion, state educational agencies paid a cost per mediation of be-
tWEEN $350 and $1000, in contrast to the due process hearings,
which ran the risk of running up costs in the tens of thousands of
dollars. A West Virginia Department of Education study re-

67 About SEEP, CENTER FOR SPECIAL EDUCATION FINANCE, http://csef.air.org/about_seep.
   php (last visited May 22, 2013).
68 Jay P. Greene & Marcus A. Winters, Debunking a Special Education Myth: Don’t Blame
   Private Options for Rising Costs, EDUC. NEXT 69–70 (Spring 2007).
69 Barbara Martinez, Private-School Tuitions Burden DOE, WALL ST. J. (July 10, 2010),
70 Id.
71 Greene & Winters, supra note 68 (indicating that only 0.46% of students with a disability
   in the state of New York, and 0.18% nationally, enroll in private placement).
73 Bruce Watson, Private School Tuition: Now More Expensive than Harvard, AOL DAILY
   FINANCE (June 22, 2001, 7:30 AM), http://www.dailyfinance.com/2011/06/22/private-school-tui-
   tion-hits-the-stratosphere-40-000-per-year/ (noting that private school tuition has increased 79% 
   over the past 10 years).
74 Assistance to States for the Education of Children with Disabilities, 62 Fed. Reg. 55,026, 
ported that during the 2008–09 school year, over half of all mediations in that state were successful in resolving the matter and cost an average of only $1,041.60. The typical due process hearing in the same year cost four times that amount.

One potential pitfall of the mediation process, however, is that it shifts the costs almost entirely to the schools—specifically, to the state educational agency responsible for the cost of mediation. Furthermore, the law is unclear as to whether parties can recover attorney’s fees in a mediation proceeding. Depending on when in the process the parties reach a resolution, and whether a party has ‘prevailed,’ one party may or may not have to pay the counsel fees of the other. While, for reasons discussed below, such an approach to payment of attorney’s fees is toxic to the mediation process, school districts often do prefer this approach because they are more likely to bring attorneys into the mediation process. Without the prospect of being able to recoup attorney’s fees, state educational agencies may be less willing to enter into mediation. However, even in the absence of this incentive, the cost of mediating disputes is still likely to be less, on average, than litigation, and school districts should therefore be more open to it.

Moreover, by the time litigation ends in AT disputes, the child has often graduated, or at least lost much of the potential benefit that using the devices and/or services would have given him. Because an effective AT provision requires the IEP team constantly to assess and re-evaluate the appropriateness of the AT, the exact services that parents seek in their original claim will likely be irrelevant by the time litigation resolves a dispute. Mediation, on the other hand, takes but a few days to conduct and increases the likelihood that the services the school offers are still relevant to the student.

Additionally, school districts are not required to provide AT when the student receives a FAPE without those services. Thus,

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76 Id. at 15.
80 Allan G. Osbourne, Jr., Providing Assistive Technology to Students with Disabilities under IDEA, 280 ED. LAW REP. 519, 527 (2012).
school districts are allowed to use litigation as a stall tactic: if a student is meeting the minimum floor of IDEA while litigation drones on, then the courts are free to determine that AT is superfluous, notwithstanding the student’s ability to achieve much better outcomes if the school district did provide AT.

B. In IEP Disputes over AT, Mediation Produces Better Outcomes

Parents and schools share the goal of providing students with a quality education.81 Because they engage in ongoing relationships that function better in the absence of animosity, parents and schools also share the incentive to prefer a cooperative mediation process to the hostility of litigation.82 Since IDEA mandates annual meetings and an IEP reevaluation at least once every three years,83 unresolved disputes and/or tension can grow incredibly toxic.

AT serves as a particularly pertinent example of the need for harmony: because it requires ongoing service, cooperation between parties is essential to students’ receiving needed services.84 Providing adequate AT requires an ongoing reassessment of whether the technologies provided meet the student’s needs.85 General guidelines recommend an initial trial period, adjustments, development of a training plan, and follow-up procedures including device modification, maintenance, and reassessment.86

Trials are helpful in collecting information about whether a particular technology will help the student achieve his or her goals, and whether that technology is appropriate for that student’s needs and environment.87 An initial trial period is especially beneficial

81 Philip Moses & Timothy Hedeen, Collaborating for Our Children’s Future: Mediation of Special Education Disputes, 18 No. 4 Disp. Resol. Mag. 4, 5 (2012).
82 Id.
84 See News and Notes, Family Center on Technology and Disability Newsletter (June 2006).
85 Considering Assistive Technology, supra note 79.
when there is a multitude of technologies available and the IEP team is not necessarily familiar with the differences among them. As new technologies with AT implications emerge, these trials will take on even greater significance. Because a trial might take weeks or possibly months to ascertain the effectiveness of a certain technology, a stable working relationship between parents and school districts is vital.

After the trial stage, the need for ongoing cooperation between parents and school districts remains. The IEP team will consider the alternatives, select a technology, and make adjustments as necessary. They will thereafter create an implementation plan providing for the procurement, setup, and maintenance of the necessary equipment; establishing training procedures for the student and support staff; incorporating the AT into the student’s IEP; and assessing the AT’s effectiveness. Once an implementation plan is in place, the IEP team must consider how to integrate the AT into the student’s daily curriculum. This stage is perhaps the most intense because effective integration demands weekly, and even daily, planning. Finally, the IEP team must convene at least several times each year to follow up on the use of the AT and reassess whether it is helping the student meet his or her goals. The ever-changing nature of AT support therefore demands that parties are able to communicate and cooperate in order to provide students with the support they need to achieve their academic goals.

88 Id.
93 Id. at 104.
Parties’ fostering an environment in which everyone can be heard can play a major role in the long-term health of their relationship.\textsuperscript{95} That is precisely what effective mediation does: it seeks to “encourage exchanges of information, help parties understand each other’s views,”\textsuperscript{96} “reduce intimidation and emotional strain, [and] enhance the capacity to tell one’s story.”\textsuperscript{97} Mediation thereby presents a far more congenial approach to dispute resolution than IEP hearings: “Most observers agree that the hearings create unnecessary antagonism between parents and school officials, rather than encouraging cooperation.”\textsuperscript{98} Both parents and school officials maintain this perception of antagonism created through the hearing process.\textsuperscript{99}

Moreover, by facilitating more open discussion, mediation allows the IEP team to discuss its interests in, and concerns about, the student’s performance and goals.\textsuperscript{100} In cases in which, for example, the team must decide among a variety of unfamiliar technologies with comparable features and benefits, the ability to candidly and clearly elucidate which criteria matter most to the parties could prove crucial in finding a solution.\textsuperscript{101}

C. Mediators Are—Potentially—More Knowledgeable and Less Biased

While both mediation and due process hearings involve third parties—mediators and hearing officers, respectively—the roles and characteristics of these third parties differ drastically. In the IEP context, mediators serve a facilitative function: they are there


\textsuperscript{96} Id. at 42.

\textsuperscript{97} Id. at 47.

\textsuperscript{98} Id. at 40.

\textsuperscript{99} Id. at 41 (“One parent, who won and considered the process fair, said: ‘It’s a waste of money. It shouldn’t have to go so far. It was a personal thing. They didn’t think I’d do it. It cost me grief and aggravation. It cost them money which they could have used to educate.’ Similarly, a school official who gave otherwise favorable ratings to all aspects of the procedures, found that the experience was flawed because it undermined relationships: ‘I disagree with the system. Parents think we’re the adversaries.’”) (emphasis added).


\textsuperscript{101} Section Three: Conduct Assistive Technology Trials, \textit{supra} note 87, at 58 (Case study highlighting that multiple choices exist for even single components of hardware. They were able to determine the best fit after trial period by engaging in discussion and determining which unit satisfied their ideal characteristics—in this case, portability and adaptability.).
to help the parties communicate with one another in hopes of finding common ground and resolution.102 Parents who have been through the process have described them as “translators” and “neutral advocates.”103 By contrast, hearing officers are arbiters: their role is to consider the evidence before them and apply the law. They are not interested in helping the parties achieve a common goal. Instead, their sole purpose is to determine whether the student received a FAPE.104

While both mediators and hearing officers should therefore have knowledge of the law, mediators have incentive to assist parties in crafting creative solutions, while hearing officers do not.105 In order to help the parties engineer these creative solutions, mediators must be cognizant of the various options available to them. Nowhere is this truer than in the context of AT, in which myriad solutions might exist for any given issue. Furthermore, IDEA allows the parties to mutually agree upon a mediator.106 Because mediators generally are compensated either on a case-by-case or hourly basis, a mediator is incentivized to develop a reputation for being knowledgeable so that parties will select him or her more frequently. Effective mediators are thus more likely to be knowledgeable about the latest developments in the special education field.

Conversely, hearing officers are expected merely to have knowledge of IDEA and state law,107 but not necessarily of the current educational environment. With technology growing at such a rapid rate, effectively providing AT requires someone who understands the latest developments in the field. Parents who seek a favorable AT outcome from a hearing officer who taught in, or had an administrative role in, a school’s special education program years ago are setting themselves up for disappointment.108

It is worth noting, however, that many of these advantages exist more in theory than in practice. In New York, local CDRCs

102 Kuriloff & Goldberg, supra note 95, at 42.
105 Kuriloff & Goldberg, supra note 95, at 42.
108 See Lynch, supra note 26, at 188–92 (discussing the prevalence of former school officials among hearing officers).
manage the list of mediators qualified to resolve IEP disputes.\textsuperscript{109} To become a “qualified” mediator, one must complete at least twenty-five hours of basic mediation training, an observation/apprenticeship program, and two days of training on special education laws and regulations; mediate other types of community cases for at least one year; and attend informational update sessions as laws and regulations change.\textsuperscript{110} While these standards are a good start, a series of additional requirements, discussed in Part V of this Note, would produce even stronger mediators.

With respect to claims of impartiality, review through the hearing process invites significant bias. While this problem is not unique to AT issues, it nonetheless has the specific result of students’ prevention from receiving necessary AT devices and services. For example, consider Antignano ex rel. R.A. v. Wantagh Union Free School District,\textsuperscript{111} in which a New York district court upheld a school district’s decision to deny student R.A. certain assistive technology for her speech and reading problems. In their complaint, R.A.’s parents alleged that the independent hearing officer was not impartial and presented evidence that the officer represented other school districts in special education matters\textsuperscript{112}—information the hearing officer should have disclosed, but failed to do so, prior to the start of the hearing.\textsuperscript{113} Upon administrative review, the state hearing officer, even after admitting that this failure to disclose was “troubling,” could not find evidence of actual bias and therefore upheld the decision.\textsuperscript{114} Though this evidence was not compelling enough to satisfy the judicial standard for bias under IDEA—a separate problem discussed below—it nonetheless casts doubt on whether the IEP without AT truly afforded the student a FAPE, or whether the original hearing officer was looking out for the interest of only the school district.\textsuperscript{115}

As mentioned above, many hearing officers are former school district employees.\textsuperscript{116} Though “such persons have the required expertise and knowledge about special education . . . they also bring

\begin{thebibliography}{9}
\bibitem{109} N.Y. Educ. Law § 4404(A) (McKinney 2007).
\bibitem{111} No. 07–2540, 2010 WL 55908 (E.D.N.Y. Jan. 10, 2010).
\bibitem{112} Id. at *8.
\bibitem{113} Id.
\bibitem{114} Id.
\bibitem{115} Id.
\bibitem{116} Lynch, supra note 26, at 190.
\end{thebibliography}
to the position the bias of working in the status quo.”117 Moreover, they “bring to the position a perspective that comes from working within the system” that “clouds their ability to perceive alternate perspectives.”118 These problems are further compounded by the fact that under New York law, the school districts are responsible for maintaining the list of qualified hearing officers119 and for compensating the hearing officers.120 Though the hearing officer for any given hearing will be selected on a random basis,121 the potential for school districts to dismiss hearing officers who display an inclination toward disagreeing with the school district is of concern.122

Unfortunately for the families of students with disabilities, judicial recourse against such potential bias is decidedly limited. The aforementioned Antignano case serves as an excellent illustration of this fact. Actual bias, rather than the appearance of impropriety, remains the standard upon which courts assess hearing officer impartiality.123 Satisfying this standard generally involves demonstrating a concrete personal or professional conflict of interest related to the matter at hand.124

Additionally, the regulations governing hearing-officer qualifications are conspicuously vague. IDEA mandates merely that the hearing officer cannot be an employee of the state educational agency or a school district responsible for the education of the child in the present case, and that the hearing officer not have a personal or professional conflict of interest in the present case.125 New York law also requires that the hearing officer not be an employee of any school district, school, or committee on special education, and not have held such a position in the past two years.126 The combination of a high threshold in demonstrating bias and skeletal standards for impartiality raises the question of whether the “fair” hearing process is actually a misnomer. While bias is clearly a chief concern for parents, school districts should also as-

117 Id.
118 Id.
119 8 N.Y.C.R.R. § 200.2(e).
120 Lynch, supra note 26, at 188.
121 Id.
122 Id. at 189 (“Moreover, an individual who relies on her compensation as a hearing officer as a source of income is currently dependent on the pleasure of the local school district to earn that income.”).
124 Id. at 121.
126 8 N.Y.C.R.R. § 200.1(x).
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gress whether they want to invite the liability and spend administra-
tive resources litigating cases in which bias is alleged.

In contrast, partiality among mediators appears to be a far less
systemic problem. First, CDRCs select the mediators among
whom the parties can choose, bypassing the thorny relationship be-
tween hearing officers and state and local educational agencies.127
Second, the parties can agree to select a mediator of their choice.128
Finally, because mediation is voluntary, if parents happen to sense
that the mediator is not allowing their voices to be heard, they can
walk away without abrogating their right to a due process hear-
ing.129 Parties should therefore prefer dealing with a mediator
rather than submitting to a hearing officer, who may uphold an
unjust IEP and thereby open the parties up to further dispute sur-
rounding a biased decision.

It is worth noting that the cost of mediation is covered by the
state educational agency.130 While this payment system does intro-
duce an element of potential bias, the current literature does not
support such a claim, and one small study even rejects it out-
right.131 Instead, bias is more likely to emerge at the local level;132
however, mediators working to settle a dispute at the local school
level are unlikely to have any connection to the state educational
agency, and thus any conflict arising from their compensation by
such agencies should be negligible.

V. Proposal

As this Note has demonstrated, mediation helps increase the
presence of AT in classrooms when parents and school districts
butt heads over which devices students require, or what the proper
level of service should be. To that end, New York state legislators
should facilitate mediation in IEP reviews in the following two
ways: (1) follow California’s and Arkansas’s lead in requiring a
meeting with a disinterested party to explain the benefits of media-

127 NYSDRA, supra note 110.
129 NYSDRA, supra note 110.
130 Id. See also 20 U.S.C. § 1415(c)(2)(B).
131 D’Alo, supra note 100, at 234.
132 Lynch, supra note 26, at 189 (discussing how moving third party involvement from the
local to the state level results in increased fairness and neutrality).
290 CARDOZO J. OF CONFLICT RESOLUTION [Vol. 15:271

tion;133 and (2) provide a statutory or regulatory remedy to the
holding in H.C. ex rel. L.C. v. Colton-Pierrepont Central School
District, which renders ineffective settlement agreements between
the parents and the school district when executed outside the
boundaries of IDEA.134 To craft a more mediation-friendly envi-
ronment, legislators also should resist the temptation to mandate
mediation.135

A. Require a Meeting with a Disinterested Party to Explain the
Benefits of Mediation

IDEA provides that:

[A local] educational agency or a State agency may establish
procedures to offer to parents and schools that choose not to use
the mediation process, an opportunity to meet, at a time and
location convenient to the parents, with a disinterested party . . .
to encourage the use, and explain the benefits, of the mediation
process to the parents.136

Parents are generally under-informed about the mediation process.
There is usually an inherent information imbalance at mediation
proceedings concerning IEPs; while the parents will be unlikely to
have ever been part of any mediation proceeding, the school dis-
trict will usually have experienced at least one mediation.137 This
problem is further compounded for minorities and families who
speak little or no English.138 Factoring these concerns in with the
numerous other choices parents must make about their child’s AT,
one must realize that requiring a meeting to explain the process
would be a great aid to parents and help give them reasonable ex-

133 State Mediation Systems. Quick Turn Around (QTA) Forum. Nat’l Ass’n of State Direc-
687 (2d Cir. 2009).
135 Contra 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 (1997).
137 Welsh, supra note 103, at 610–11.
138 John W. Reisman, et al., Parents’ Experiences with the IEP Process—Considerations for
Improving Practice, CENTER FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION
Process.pdf.
pectations that lead to greater cooperation with the school
district.139

While IDEA enables states to hold a meeting with a disinter-
ested party, only two states, California and Arkansas, have actually
mandated such meetings.140 New York’s policy is to strongly en-
courage these meetings, but it has yet to require them.141 Thus far,
it seems that no one has conducted any sort of comprehensive
study on whether such meetings result in more mediation proceed-
ings. This lack of information makes difficult an assessment of how
urgently state educational agencies should require these meetings.
However, the strong success of mediation in California suggests
that these meetings likely have some positive impact on mediation,
notwithstanding the significant caveat that other factors might ex-
plain the state’s degree of success in mediating claims.142

Nebraska officials have noted a practical limit of this provi-
sion: the school district is more likely to reject mediation than is a
parent.143 This predilection for rejecting mediation renders the
meeting with a disinterested party effectively moot; the parents
end up learning about an avenue of resolution that is unavailable
to them. Even so, this should not deter New York and other states
from instituting a policy to require these meetings. Such meetings
would not present a huge burden to state educational agencies, and
the benefits of informing parents of their rights surely outweigh the
costs, even if such meetings lead to only a slight increase in the
number of mediations.

B. Allow Settlements to be Made Outside the Bounds of IDEA

In H.C. ex rel. L.C. v. Colton-Pierrepont Central School Dis-

crict, the parents and the school district reached a settlement agree-
ment in which the school district would provide the student with a
computer, software, table, chair, and various accessories,144 all of

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139 See generally Welsh, supra note 103.
140 State Mediation Systems, supra note 133.
141 Id.
142 Jonathan A. Beyer, A Modest Proposal: Mediating IDEA Disputes Without Splitting The
Baby, 28 J.L. & EDUC. 37, 44–45 (noting “that disputants reach agreement using mediation in
more than sixty percent of the cases.”).
143 State Mediation Systems, supra note 133, at 4.
which constitute AT. 145 The Second Circuit ruled that the agreement was unenforceable because it was made outside the bounds of the IDEA mediation or resolution meeting process. 146 Explaining its decision, the court stated that the settlement agreement:

[D]oes not concern the ‘identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.’ 20 U.S.C. § 1415(b)(6)(A). As such, resolution of the dispute will not benefit from the ‘discretion and educational expertise [of] state and local agencies, [or the] full exploration of technical educational issues’ related to the administration of the IDEA. 147

The court claimed that the hearing officer therefore could not enforce the agreement. 148 On remand to the Northern District Court of New York, the plaintiff failed to prove that a contract claim—usually governed by state law—on the settlement agreement furnished subject matter jurisdiction. 149 After two levels of administrative hearings, one trip to the Second Circuit, and two times before the District Court, the plaintiff’s only recourse, then, was to bring this claim in contract in state court, four years after the parties reached the original settlement agreement. 150

This holding, which courts continue to treat as good law, 151 unnecessarily hampers the ability of the parties to reach a mutually satisfactory agreement that would put much-needed technology in the hands of students with disabilities. The Second Circuit, and the courts that follow its jurisprudence, presumes that an agreement made outside the procedural safeguards of IDEA is insufficient for according a child a FAPE. 152 While the desire to maintain uniform due process procedures is understandable, the means of the procedural safeguards should be secondary to the goal of according students a FAPE.

145 Hager, supra note 15, at 1–4 (discussing the broad range of devices and services which are classified as AT).

146 H.C. ex rel. L.C., 341 Fed. App’x at 690.

147 Id.

148 Id.


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Congress should therefore amend IDEA, allowing federal courts to effectuate settlement agreements even if the parties agree to the settlement outside the bounds of a mediation or resolution session.\footnote{20 U.S.C. § 1415 (2005).} The legislation should provide for a review of such agreements, putting the burden on the school district to prove that the agreement does not reasonably accord the child some educational benefit. Such an amendment would effectuate Congress’s goal of promoting efficient dispute resolution and allow children to get access to AT in a timely fashion.

C. Offer a More Knowledgeable Pool of Mediators to the Parties

As discussed above, mediators are, theoretically, incentivized to be well-versed in the latest special education trends, particularly in AT. However, in practice, empirical data shows obvious gaps in mediator quality.\footnote{See D’Alo, supra note 100.} Legislators should set more stringent qualifications, and administrative officials should raise compensation levels in order to improve the knowledge and performance of mediators.

Both IDEA and New York law are essentially skeletal when considering mediator requirements.\footnote{NYSDRA, supra note 110.} One simple and beneficial change would be to require mediators to take more Continuing Legal Education (“CLE”) classes. This would be a more proactive approach than the current scheme, which requires only that mediators attend six hours of continuing educational programming every two years\footnote{Rules of the Chief Administrative Judge, New York Unified Court System § 146.5. To contrast with other leading state schemes, New Jersey mandates four hours annually; Idaho twenty hours every two years; Kansas six hours annually; Maine fifteen hours annually for most disputes; and California mandates 16 such annual hours for mediators in the practice of child custody. While these are not the requirements to actually serve as a mediator (no state imposes such requirements), they are the qualifications that most state courts require of mediators to list them on their mediator referral lists. State Requirements for Mediators, MEDIATION TRAINING INST. INT’L, http://www.mediationworks.com/medcert3/staterequirements.htm (last visited Feb. 3, 2013).} and additional information sessions when there is a substantial change to the law.\footnote{NYSDRA, supra note 110.} Such continuing education
programming is readily available, and requiring only six hours every two years does not bring a mediator remotely close to comprehending the complexities of the law. Even though the effectiveness of CLEs on performance is unclear, increased training requirements would at least improve the credibility and consistency of mediators and, thus, make mediation a more attractive option to parties.

Another obvious way to raise the quality of mediators is to raise their pay. While few, if any, NYSDRA mediators are motivated primarily by financial incentive, raising compensation would nonetheless encourage mediators to invest more time and education in this pursuit. The budget for these wages could come from funds allocated to hearing officers, which would further ensure that such officers, paid by the school districts, were truly disinterested in pushing a school’s agenda.

D. Avoid the Temptation to Make Mediation Mandatory

IDEA requires both parties to consent to mediation. While mandating that the parties attempt mediation might be an ostensible solution, it is, in fact, not a solution at all. Involuntary mediation leads to hostility and a lack of communication, both of which

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159 There is a dearth of research concerning the correlation between CLE attendance and improved attorney performance. The latest literature seems to date back to the 1980s, finding no evidence correlating competence and CLE education. See John S. Roth, Is Mandatory Continuing Legal Education Valid Under the United States Constitution? Verner Vision and the Rationally Related Competence Connection-A Fortiori or A Lot of Alliteration, 11 Whittier L. Rev. 639, 647 (1989).

160 Brien Wassner, A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs, 4 Cardozo J. Conflict Resol. 3 (2002) (noting that, “The problem under the current system is that a potential party does not know what they are going to get; i.e. a properly trained mediator who has undergone apprenticeships and has established himself/herself in the field or a mediator who has just finished a six-hour training course,” and that “[p]ermitting a person to mediate cases and conflicts without a certain minimum level of training could very well lead to that person giving unacceptable and unlawful legal advice.”).

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are fatal to the quest for satisfactory outcomes.\textsuperscript{162} Even though legislators favor mediation because it resolves disputes at a small fraction of the cost,\textsuperscript{163} they should not force parties into mediation if those parties are not prepared to work toward mutual understanding.

VI. Conclusion

Technology has changed tremendously in the past few decades.\textsuperscript{164} From 1986–2007, computing power increased, on average, approximately 58\% per year,\textsuperscript{164} yet the costs of such technologies are generally decreasing.\textsuperscript{165} At the same time, as American troops return from combat abroad, medical advancements and other technologies have introduced tremendous innovation and inspired new hope in those living with previously debilitating disabilities.\textsuperscript{166} All of these trends have serendipitously benefitted students with disabilities, and as service providers realize the potential of these new technologies,\textsuperscript{167} they will increasingly turn to them. The largest obstacle to providing AT is not, therefore, the limit of science, but rather the state of the law and its application through a highly adversarial litigation process.

Mediation presents a generally highly attractive alternative to adversarial dispute resolution in special-education settings. When disputes involve conflict over AT, the case for mediation becomes even stronger. The usual arguments for mediation relating to efficiency and expediency carry greater weight when set against the backdrop of a child trying to procure technology that is current and relevant to his or her present needs. Mediation’s ability to preserve good faith, strengthen communication, and illuminate mutual understanding among parties is especially critical when an IEP team needs to incorporate AT into daily curricula and reassess the

\textsuperscript{162} See Shemberg, supra note 135.
\textsuperscript{163} See Proposed Rules, supra note 74.
\textsuperscript{164} Martin Hilbert, et al., The World’s Technological Capacity to Store, Communicate, and Compute Information, 332 SCIENCE 60, 63 (2011).
\textsuperscript{167} See Mozaffar, supra note 2; Garberoglio, supra note 3.
strengths and weaknesses of certain technologies on a regular basis. In addition, when choosing whether to involve third parties in dispute resolution, the clarity and impartiality a qualified mediator offers over a hearing officer can prove indispensable in finding a desirable solution.

Of course, there is still much room for improvement. New York could follow the lead of California and Arkansas in requiring parents to meet with a disinterested party who will explain the benefits of mediation; such a measure would help correct the informational gap that exists between parents and the school districts. Legislators could reform IDEA to allow for a broader range of agreements to resolve disputes; while the 2004 expansion of IDEA to require mediation was a great step forward, limiting enforceable resolutions to its narrowly prescribed procedure only hinders its goal of according students a free and appropriate public education. The raising of qualifications and payment of mediators would help safeguard the fate of some of the most disadvantage students.

In following the proposed steps this Note has set forth, New York would likely see more mediation. In turn, there would be more AT and fewer kids being left to their own devices.