

Fall 2009

## Why Negotiating IDEIA Placements is Bad for Children

Megan Roberts Hutchinson

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Megan R. Hutchinson, *Why Negotiating IDEIA Placements is Bad for Children*, 5 Fla. A&M U. L. Rev. (2009).  
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# WHY NEGOTIATING IDEIA PLACEMENTS IS BAD FOR CHILDREN

*Megan Roberts Hutchinson*<sup>†</sup>

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## I. INTRODUCTION

Despite negotiation often being less costly, less contentious, and less time-consuming than litigation,<sup>1</sup> it may not always lead to appropriate placements for children with disabilities, as required by law.<sup>2</sup> Take, for example, the case of a seventh grade girl, Beth, with Rett syndrome.<sup>3</sup> Beth had no verbal abilities, and her estimated mental age was between eighteen months and four years.<sup>4</sup> Like her peers, she attended English, Math, and Science classes every day, but the similarity ended there.<sup>5</sup> Beth looked at cards containing letters of the alphabet with the help of an aide, while the class read novels; gazed at number cards while her peers mastered pre-algebra; and stared at pictures of clouds while her peers studied meteorology.<sup>6</sup> At the annual meeting to discuss Beth's Individualized Education Program (IEP),<sup>7</sup> her parents

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1. U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATIONS AND OTHER STRATEGIES TO RESOLVE CONFLICTS 1-2 (2003) (hereinafter GAO REP.), <http://www.gao.gov/new.items/d03897.pdf>.

2. 20 U.S.C. § 1412 (2005) (requiring that a student be placed in the "least restrictive environment appropriate"). For the purposes of this paper, placements will be discussed in terms of "appropriate." See generally Steven Marchese, *Putting Square Pegs Into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333 (2001).

3. *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1066 n.3 (7th Cir. 2007). "Rett syndrome is a 'neurodevelopmental disorder characterized by normal early development followed by loss of purposeful use of the hands, distinctive hand movements, slowed brain and head growth, gait abnormalities, seizures, and mental retardation.'" (quoting *Bd. of Educ. v. Ross*, 486 F.3d 267 (7th Cir. 2007)).

4. *Beth B. v. Van Clay*, 282 F.3d 493, 495 (7th Cir. 2002).

5. *Id.* at 495-96.

6. *Id.*

7. 20 U.S.C. § 1414 (2004). IEPs are the key tool of the IDEIA, requiring that each student with disabilities receive services and placements that are tailored to his or her needs.

asserted that Beth should remain in regular classes every day.<sup>8</sup> The school disagreed.<sup>9</sup>

Similar disagreements between parties – parents and school officials – over the placement of students with disabilities are not uncommon, as every child with disabilities must be placed according to individualized considerations.<sup>10</sup> As a result, parties frequently negotiate disputes similar to this at IEP meetings or at pre-due process hearing mediation sessions.<sup>11</sup>

The Individuals with Disabilities Education Improvement Act (IDEIA)<sup>12</sup> requires that a child's educational placement be an "appropriate" one.<sup>13</sup> For any given child, there should theoretically exist a range of substantively appropriate placements.<sup>14</sup> This spectrum represents the "bargaining zone"<sup>15</sup> of placements within which the parents and school would negotiate. Although the IDEIA encourages student placements through IEP meeting agreements and also compels states to offer mediation,<sup>16</sup> there is no oversight or guidelines to ensure that negotiated placements are, in fact, "appropriate." Parents and schools often do not know which placements would be appropriate (or within

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8. *Beth B.*, 282 F.3d at 495.

9. *See id.* at 496.

10. 20 U.S.C. § 1414 (2005).

11. GAO REP., *supra* note 1. Although many disputes arise over what services the school will provide or what accommodations the school will make for the child with disabilities, this Note focuses solely on disputes about children's placements, which constitute the majority of litigated disputes. James R. Newcomber & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD 469, 478 (1999).

12. 20 U.S.C. §§ 1400-85 (2005). The IDEIA was preceded by the Individuals With Disabilities Education Act (20 U.S.C. §1414 (1990)), the Education of All Handicapped Children Act (Pub. L. No. 94-142, 89 Stat. 773 (1975)), and the Education for the Handicapped Act (Pub. L. No. 91-230, §§ 601-685, 84 Stat. 175 (1970)). Like its predecessors, the IDEIA governs the special procedural and substantive requirements for educating students with disabilities, including such topics as classroom placements, specialized services, and parental and school involvement in determining the appropriate placement and services for a child.

13. 20 U.S.C. § 1412(a)(5) (2005).

14. Substantively appropriate placements vary from child to child, but are those in which a child receives educational benefit in the least restrictive environment available. *See, e.g.*, Marchese, *supra* note 2, at 335.

15. The bargaining zone is the distance between what each negotiating party would be willing to accept from the negotiation. RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 34 (2002). For example, in the selling of a car, if the owner would not sell for less than \$10,000 and the buyer would not pay more than \$12,000, then the bargaining zone would be that area between the two amounts.

16. Mediation is provided at no cost to the schools or parents and is often quicker and less costly than court. 20 U.S.C. § 1415 (2005).

the bargaining zone).<sup>17</sup> As a result, negotiation may result in misplacement of the student or needless disputes due to parties' uncertainty about where the zone lies.<sup>18</sup>

In Beth's case, the parents demanded an inappropriate placement (the regular classroom) for their daughter.<sup>19</sup> Assume that the school had suggested the least restrictive "appropriate" placement, for instance, the special education classroom, and that the parties had then negotiated to a middle ground: a half day placement in special education classes and a half day in regular classes. The placement negotiated would have been beyond the range of appropriate placements, or beyond the "bargaining zone" for an IDEIA negotiation.

Mediation may generate appropriate educational placements for children with disabilities in some cases, but the process does not ensure that substantively appropriate placements for children result. The IDEIA is designed to allow parties to settle student placement disputes through mediation.<sup>20</sup> However, this assumes that parties understand what sorts of placements would be "appropriate" for the child and that they will consider the child's best interests, rather than their own interests as agents for the child. Parties may not have a common understanding of what mediation is for, how to prepare for mediation, or what considerations should determine the parameters of the bargaining zone. This can result in them making substantively bad agreements—ones that are outside the "bargaining zone" of "appropriate" placements. To enable parties to negotiate appropriate placements for children with disabilities, the Department of Education should establish guidelines for appropriate placement options for children based on disability, social and academic abilities, and age.

To explain why mediation is inappropriate for making placement decisions, this Note will begin with an explanation of the IDEIA, its requirements in terms of mediation, and the manner in which these negotiations are carried out. It will then present the problems with negotiating placements, specifically the lack of an identifiable bargaining zone, the parties' skills to negotiate, and the substantively

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17. 20 U.S.C. § 1414 (2004) (setting forth the requirement that the placement and services for each child be determined on an individual basis and without substantive guidelines, and so not using placements of other children as guidelines).

18. Appropriate placements are often unknown at the time of an initial IEP meeting, as evidenced by the law's requirements that the parties work together to determine what an appropriate placement will be and the many disputes that arise after those placements do not work out. *See, e.g., Beth B.*, 282 F.3d at 495 (7th Cir. 2002); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).

19. *See Beth B.*, 282 F.3d at 495.

20. 20 U.S.C. § 1412 (2005).

inappropriate placements that can result. This Note will conclude with suggestions for improving the efficiency of the placement decision-making process by improving parties' understanding of negotiation and by providing guidelines to serve as an objective starting point for negotiation.

## II. THE IDEIA'S REQUIREMENTS—WHY THESE ARE NOT ALWAYS MET THROUGH MEDIATION

The IDEIA mandates mediation for parents and schools in disputes that cannot be resolved at IEP meetings.<sup>21</sup> The parties can either opt for voluntary mediation or will have a mandatory mediation as a step in the pre-trial stage.<sup>22</sup> Although the IDEIA requires placements to be those that are “appropriate” for children,<sup>23</sup> thus suggesting that an appropriate placement exists for each child, mediation may not discover such a placement. Negotiating placements can be a contentious process in which one or both parties use power to effectuate their goals.<sup>24</sup> The use of power can be a beneficial strategic tool in some negotiations.<sup>25</sup> However, in placement disputes, the use of power leads to distrust and commitments where none need exist.<sup>26</sup> One party's use of power can undermine reasoned discussion and exchange of information that could lead to an appropriate placement decision. The differences in the interests of parents, schools and the child himself can also contribute to the agents agreeing upon placements that are inappropriate.<sup>27</sup>

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21. 20 U.S.C. § 1415(e)(1) (2005).

22. 20 U.S.C. § 1415 (2005).

23. 20 U.S.C. § 1414 (2005).

24. Demetra Edwards, *New Amendments to Resolving Special Education Disputes: Any Good Ideas?*, 5 PEPP. DISP. RESOL. L.J. 137, 148 (2005) (noting that the short time frame in which to resolve formal complaints regarding student placements can be used as “a possible delay and pressure tactic”); see also David Kirp & Donald Jensen, *What Does Due Process Do?*, 73 PUB. INT. 75 (1983) (recognizing early on that disputes between parents and schools regarding students with disabilities could become contentious).

25. Power in negotiations is the ability to “bend the opponent to your will.” KOROBKIN, *supra* note 15, at 151-56. Thus, for example, if a consumer goes to an electronic store to buy a stereo, he is expected to pay ticket price for that stereo, and he may lack bargaining power to do otherwise. However, if he brings with him a competitor's advertisement showing he can get the same stereo for less, the first electronics store might give him a discount on the stereo. The consumer's use of the ad to convince the electronics store to change its price would be a successful use of power.

26. See Edwards, *supra* note 24, at 149 (noting issues of distrust between parents and schools having been recognized by Congress); Interview with J.L.H., Teacher, (Nov. 20, 2008) (explaining that parents often disregard the advice of counselors because of distrust of school employees' motives).

27. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1400 n.5 (9th Cir. 1994).

A. *The IDEIA Requirement of Negotiation / Mediation*

Parents and schools go through many stages of negotiation over the course of their dealings.<sup>28</sup> IEP meetings are the primary forum for making decisions regarding a child with disabilities.<sup>29</sup> The law requires that schools and parents devise the IEP together and that both parties sign off on the accommodations, services, and placements agreed upon.<sup>30</sup> When the parties do not agree on such issues at IEP meetings, they can either go through voluntary mediation or opt for a due process hearing, which is preceded by mandatory mediation.<sup>31</sup> Formal mediation is required for many reasons, but primarily because it is considered less contentious (and therefore better for children) and less costly (and therefore a more efficient use of public monies) than litigation.<sup>32</sup>

Mediation is also useful in determining placements for children, as it allows the strengths of each party to be put to use in determining a child's placement: school officials possess more expertise in the field of education,<sup>33</sup> while parents know their children better.<sup>34</sup> The requirement of parent participation in IDEIA decisions, at IEP meetings, and in mediation is designed to encourage information exchange and cooperative decision-making.

Finally, as both the parents and the school represent the same client—the child<sup>35</sup>—the law suggests that negotiating a placement should result in a suitable one, as the parties share the mutual interest of placing the child appropriately.<sup>36</sup> This is not always the case as par-

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28. 20 U.S.C. § 1414(d) (2005) (requiring at least annual IEP meetings involving parents and educators); 34 C.F.R. § 300.506 (2006); 34 C.F.R. § 300.152(a)(3)(ii) (2006) (making mediation available at some stages of placement decision-making).

29. 20 U.S.C. § 1414(d) (2005) (requiring that parents and schools work to identify mutually agreeable placements and services for each child with disabilities).

30. 20 U.S.C. § 1415 (2005).

31. 34 C.F.R. § 300.506 (2006); 34 C.F.R. § 300.152(a)(3)(ii) (2006). Though such mediation was previously available to the parties at their own expense, the 1997 and 2004 Amendments to the Individuals with Disabilities Education Act (IDEA) mandated that states offer and cover the costs of mediation.

32. GAO REP., *supra* note 1, at 18.

33. See *Beth B.*, 282 F.3d at 496 (7th Cir. 2002).

34. There are 6.5 million placements each year, but only twenty-one disputes total per 10,000 students with disabilities. GAO REP., *supra* note 1, at intro.

35. 20 U.S.C. § 1415 (2005). Under the IDEIA, either the school or the parent may bring a claim if the other party will not agree to a placement decision, in order to get the dispute before an impartial hearing officer.

36. 20 U.S.C. § 1415(f)(1)(B) (2005) (requiring that parents and schools attempt to work out disputes on their own, without a mediator, and therefore assuming that these parties can determine what is best for the child).

ents and schools, as agents for the child, are often saddled with the common agency-principal problem of differing interests.<sup>37</sup> These agents' differing interests may interfere with them choosing a placement that is in the child's best interest—one that is within the bargaining zone of appropriate options.<sup>38</sup> Schools may be tempted to focus on minimizing costs and on utilizing placements already available in their districts. On the other hand, parents may be tempted to seek the most expensive, cutting-edge option available on the market, or may be overly protective or blindly optimistic about their children to the point of not recognizing their child's abilities or limitations in the school setting.<sup>39</sup> Thus, the child's best interests may be overlooked as the child's agents negotiate based on their own interests.

The law focuses on the procedural requirements of negotiating at IEP meetings and at formal mediation, such as who must be present and how often these interactions must occur,<sup>40</sup> possibly to the detriment of the child. Such meetings are unguided, as the placement that parties agree to for the child go before no uninvolved third party for consideration or approval.<sup>41</sup> Rather, it is assumed to be an appropriate placement simply because the procedural requirements were met.<sup>42</sup> It is of no concern whether the agreement was reached because the agents' interests were satisfied or because the child's were. While the law also requires that the placement agreed upon be reasonable, it fails to ensure that it is.<sup>43</sup> The procedural requirements overshadow the ultimate goal—ensuring the child is appropriately placed.

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37. KOROBKIN, *supra* note 15, at 311-12.

38. *Id.*

39. *See, e.g., Beth B.*, 282 F.3d 493.

40. 20 U.S.C. §§ 1400-85 (2000). *See also* M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 646 (9th Cir. 2005) (finding absence of a regular education teacher at an IEP meeting a significant violation of the law).

41. Mark D. Weber, *Reflections on the New Individuals With Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 31 (2006).

42. 20 U.S.C. § 1412(a)(5) (2005). The IDEA does not indicate to parties how a reasonable placement is determined, except to say that a reasonable placement is one in the "least restrictive environment" "appropriate."

43. 20 U.S.C. § 1412(a)(5) (2005).



*B. Negotiation Styles and Strategies Used at IEP Meetings and in Mediation and the Problems with These Tactics*

1. At IEP Meetings

Yearly IEP meetings involving parents and educators represent the first stage of negotiation,<sup>44</sup> and these meetings often set the stage for how discussion and negotiation will proceed in the future. Most IEP meetings end in placement agreements,<sup>45</sup> but these agreements involve no third party judgment.<sup>46</sup> Thus, the law assumes that because parents and educators are both in a position to represent the child's best interest, such placements will be appropriate. This is probably true most of the time, but the use of power by either party, the lack of information disclosure between them, or a focus on their own interests over the child's can lead to inappropriate placements. If, for example, the parents of a child who has been in special education all day are particularly concerned about their child being with non-disabled children for part of the day, then the school could offer that the child spend lunch and P.E with non-disabled children. This placement would require fewer school resources than educating the child specially and would give the child more time with non-disabled children, as mandated by the law and desired by parents.

Moreover, IEP meetings are not contentious and involve parents reviewing and making suggestions to the IEP presented by the school.<sup>47</sup> At such meetings parties can use integrative bargaining to discover opportunities for beneficial compromises and concessions. They can also effectively negotiate the details using logrolling in order to get what they each want and to achieve a good outcome for the child.

Unfortunately, parties at many IEP meetings are less cooperative and instead attempt power plays to achieve their goals. IEP meetings are intended to be cooperative opportunities for parents and educators to make choices for the child, yet parties' use of power in negotiating breeds negativity and inhibits good decision-making.<sup>48</sup>

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44. 20 U.S.C. § 1415 (2005).

45. GAO REP., *supra* note 1, at 2 (noting that nationwide in 2000 there were only five due process hearings, ten state complaints, and seven mediations per 10,000 disabled students).

46. Weber, *supra* note 41.

47. GAO REP., *supra* note 1.

48. *Id.*; See generally *Beth B.*, 282 F.3d at 497-99; *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217-18 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058

Parties at IEP meetings negotiate annually,<sup>49</sup> making it likely that the use of power and its associated bad will could inhibit cooperative negotiation and beneficial agreement-making in the future as well.<sup>50</sup>

Schools and parents also can use the power tactic of patience.<sup>51</sup> Because teachers' and administrators' time is limited, the school may be tempted to present issues in a hurried manner that may push parents to sign IEP forms without their input considered.<sup>52</sup> This implicit impatience, suggesting superior authority on the part of the school, may convince some parents that a quick decision is required, eliminating patience as a tactic and devaluing the parents' concerns. IEP meetings may not cost parties anything except time; however, the party with more time gains power.<sup>53</sup> Parents, therefore, have a great incentive to stand firm to demonstrate their unwillingness to agree unless their own suggestions are considered and included in the IEP. A school may make concessions so that the meeting can be adjourned before its overworked employees demand to be excused, as the IDEIA has a procedural requirement that four school personnel be present at the IEP meeting.<sup>54</sup> "Patience is a virtue" in some walks of life, but in an IEP meeting, patience may be used as a power tactic. Thus, patience, or holding out, may lead to a less appropriate placement for the child, if that is what the party wielding the power is seeking.

Parents and schools also use the power tactic of changing the perception of the bargaining zone. Parties may alter the perceptions of the bargaining zone either because they have aspirations beyond what is reasonable (due to a focus on their own interests rather than those of

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(6th Cir. 1983). In all of these cases, as in the thousands of placement decisions that go through formal resolution proceedings, parents and/or schools each asserted power by holding out rather than finding a compromise.

49. 20 U.S.C. § 1414 (2004) (setting out IEP requirements, which include annual review of the plan).

50. Perry A. Zirkel, et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 30 n.13 (quoting the Ninth Circuit's criticism of contentiousness in special education disputes in *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1400 n.5 (9th Cir. 1994)).

51. GAO REP., *supra* note 1; *see also* 20 U.S.C. § 1414 (2004). School officials and teachers are often pressed for time and have to make dozens of IEP meetings a year, so they are less likely to be willing to "wait it out" to compel agreement by the parents. Parents, on the other hand, though busy as well, have only one IEP meeting per year for their child, making those hours spent negotiating relatively more important and making patience a useful tactic.

52. Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 630-31 (2004).

53. KOROBKIN, *supra* note 15, at 151-56.

54. 20 U.S.C. § 1414 (2004).

the child) or because they are uncertain about either their own reservation price ("RP") or that of their opponent.<sup>55</sup> For example, parents may propose or demand placements beyond those that would be appropriate, increasing the upper bounds of the bargaining zone. Most parents are not experienced negotiators in the field of education, however, so they may be unlikely to ask for excessive services<sup>56</sup> in order to exercise power or to change the bargaining zone. They may ask for them simply because they want their child to receive the best, most expensive, or most cutting-edge service or placement available.<sup>57</sup> Thus, parents may make unreasonable proposals without realizing how these proposals may alter or expand the perceived bargaining zone beyond what would result in an appropriate placement.<sup>58</sup> Just as parents might sometimes seek placements beyond the bargaining zone of appropriate placements, schools might lowball parents, offering less than the child should receive under the law. Schools, being cost-conscious, are likely to offer those programs or placements that already exist, rather than creating new programs or placements for a single child. By proposing placements outside the bargaining zone, the school might shift parents' perceptions of where it lies.<sup>59</sup> In these cases of shifted bargaining zones, the negotiation may seem successful even where the child is inappropriately placed. Imagine, for example, that the parents propose that their autistic child be placed in the regular classroom at all times, even though the reasonable placement would be a specialized school for the autistic. If the school makes this reasonable suggestion, then during negotiations the school might be persuaded to make concessions to move the placement decision toward a compromise. The reverse is also likely to happen, with the parents making a reasonable proposal and the school proposing something outside the bargaining zone, thus altering the perception of the bargaining zone.

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55. KOROBKIN, *supra* note 15, at 38-41, 57-63.

56. 20 U.S.C. § 1401 (2005). Students must receive services necessary to allow them to benefit from school. For example, services may include transportation to a specialized school, counseling services, speech-language pathology, physical and occupational therapy, a one-on-one aide to accompany the child throughout the day, special resource classes or teachers to assist the child with assignments or skill development, or modified instruction or expectations from regular classroom teachers.

57. Just because a service or placement is appealing or offers a lot for children with specific disabilities does not make it appropriate. *See, e.g., Beth B.*, 282 F.3d at 495. However, parents, being fierce advocates for their children, may seek out what sounds promising statistically or in general despite it not being the right choice for their child.

58. *See id.*

59. KOROBKIN, *supra* note 15, at 93-94.

Alternatively, parties may change the bargaining zone due to uncertainty about their own RP or that of their opponent.<sup>60</sup> If parties do not know what placements would be reasonable, then they cannot know where the bargaining zone is. The law is unclear about what makes a placement “appropriate,”<sup>61</sup> so both parents and schools are often unsure what options to consider. Both parties’ RPs should be within the range of appropriate placements, but because there is no substantive guidance about where the bargaining zone of appropriate placements lies, they cannot necessarily set reasonable RPs representing placements that would serve the child’s best interests.

Another power tactic parents and schools employ is that of making commitments. Parents, especially the wealthier and more educated, can threaten to sue if the school does not meet their demands.<sup>62</sup> This empowers parents to threaten to refuse to sign the IEP form unless their ideas are incorporated or their demands are met. Because the school is under federal mandate to create an IEP for each child within a specified time frame,<sup>63</sup> parental refusal to consent can pressure schools to give in to demands that they otherwise would ignore.<sup>64</sup> In either event, the power that parents would wield over schools may induce schools to agree to placements that are not educationally appropriate for the child—placements outside the “bargaining zone.”

Schools may also use commitment as a power tactic,<sup>65</sup> which can result in similarly inappropriate educational placements for chil-

60. KOROBKIN, *supra* note 15, at 38-41, 57-63.

61. See Megan Roberts, *The Individuals With Disabilities Education Act: Why Considering One Individual at a Time Creates Untenable Situations for Students and Educator*, 55 UCLA L. REV. 1041, 1057-72 (Apr. 2008) (discussing the circuit split over the factors to use in determining the appropriateness of a placement, as evidenced in: *Beth B. v. Van Clay*, 282 F.3d 493, 497-99 (7th Cir. 2002); *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217-18 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983)).

62. Dee Alpert, *Tactics & Strategy in Mediations and Negotiations Dee Albert*, <http://www.Harborouselaw.com/articles/mediate.alper.htm> (last visited Mar. 10, 2007). In fact, parent advocacy websites suggest that it is okay to “say things in mediations that aren’t true but may make the other side believe that you’re going to cost them a fortune.” This is not particularly likely at such an early stage in the process of determining a child’s placement, for both parties have a lot to lose by being uncompromising (such as time, money, goodwill, the child’s educational best interests for the time being, etc.). If the parents have a history of suing the school, however, it is more likely that such a threat could be made and would be perceived as credible.

63. 20 U.S.C. § 1414 (2005).

64. See, e.g., *M.L. v. FED. WAY SCH. DIST.*, 394 F.3d 634 (9th Cir. 2005).

65. KOROBKIN, *supra* note 15, at 63.

dren. Schools have a significant incentive to “stick to their guns” in their initial offer,<sup>66</sup> so that they do not set a precedent for giving in to these parents or to others with whom they may negotiate in the future. Thus the school may suggest that it cannot budge, despite the fact that the placement might be inappropriate.

## 2. At Formal Voluntary and Mandated Mediations

Once parents and schools have failed to agree on a placement at IEP meetings, the next step is either voluntary mediation or a federally mandated pre-trial settlement conference.<sup>67</sup> If the parties are unwilling to mediate and instead prefer to take their dispute before a hearing officer, they can then skip voluntary mediation.<sup>68</sup> Regardless of which option is taken, the pressure is on both parties to come to an agreement, rather than to spend more time, incur greater costs, and further injure their relationship.<sup>69</sup> The placement agreed upon may be substantially no better than what was proposed at the IEP meeting. Despite the pressure for the parties to come to an agreement, both parties also retain their original incentives to push for what they want and may even believe they have more reason to do so.<sup>70</sup> This can lead to a misuse of power.

### *a. Use of Power*

While both parents and schools have experience with IEP meetings, schools generally have more experience with formal negotiations.<sup>71</sup> This may allow a school to intimidate the parents by

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66. Special educators must prepare a set of goals and a proposed IEP for a child before the meeting. 20 U.S.C. § 1414 (2005). Regular classroom teachers are consulted in the formation of the IEP, and the final product is that which is initially offered to the parents at the IEP meeting. *Id.* While parents are supposed to be a part of the decision-making process under the law, the author has witnessed that they often end up being walked through an explanation of the goals of IEP and then are asked to sign the forms. As a result of the overwhelming amount of information and the larger presence of school officials than parents (four school personnel need to be present, while only one parent need attend (20 U.S.C. § 1414) (2005)), parents can get mired in the minor details, rather than demanding other placement options. If a parent is fixated on the wrong points, the resulting placement could be inappropriate.

67. 20 U.S.C. § 1415(e)-(f) (2005).

68. *Id.*

69. Zirkel, *supra* note 50.

70. See Edwards, *supra* note 24, at 152 (noting the difficulties in cooperative negotiation that can result when the parties have previously engaged in contentious negotiations).

71. Weber, *supra* note 41, at 31; Edwards, *supra* note 24, at 152-53. See generally GAO REP., *supra* note 1. While any parent will negotiate on behalf of only a child or two with

confidently framing its chances of prevailing in court or by discussing the increased costs of going to court.<sup>72</sup> Going to court would be the parents', schools', and children's Best Alternative to a Negotiated Agreement ("BATNA"), because if the parties do not come to an informal and mutually agreeable resolution, litigation is the only real option.<sup>73</sup> Schools have an incentive to pursue the dispute in court in order to dissuade future litigation or threats of litigation. Parents might view the school's commitment to go to court (if its offer is not accepted) as a credible one, especially at this advanced stage. Parents' inferior position in terms of power, experience and funds may lead them<sup>74</sup> to concede to a placement outside the "bargaining zone."

Similarly, parents, especially those that are wealthy who have more resources, can make convincing commitments to take the dispute to court to get their child placed as they see fit. Credible threats to go to court could induce schools with tight budgets and reputational concerns to give in to parents' demands, even when the parents seek an unreasonable placement. Parents have an added incentive to hold out, because if the dispute never gets to court, the parents cannot recoup their attorney's fees.<sup>75</sup> This makes parents' threats of going to court convincing. Thus, the parties might again miss the chance to come to an agreement on an appropriate placement,<sup>76</sup> or the school could reach an inappropriate one due to its aversion to going to court.

### *b. Risk preference considerations*

Like the opponent's use of power, risk preferences can affect parties' willingness to agree to placements outside the bargaining

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disabilities, schools will be on the other side of the negotiating table in every case. As there are millions of students with disabilities, schools have many opportunities to negotiate in IEP meetings and mediations.

72. 20 U.S.C. § 1411 (2005). Potential costs include expert fees, for which parents do not get reimbursed, lost wages during court time, attorneys' fees (if the school prevails) and even the risk that the parents could end up having to pay for the school's attorney fees if the parents have pursued a case which is found to have been harassing or frivolous.

73. 20 U.S.C. §§ 1414, 1415 (2005). The child's BATNA and his agents' BATNA are conveniently aligned, even though their preferences and interests may not be (as discussed throughout). If the parties go to court, the case will be heard by an administrative law judge (and if appealed, by a regular judge) who will consider the substantive appropriateness of the placement options sought by the parties.

74. Edwards, *supra* note 24, at 152. This would be especially true of lower-income parents, who are less able to take such financial risks.

75. 20 U.S.C. § 1415(h)(3) (2005); *see also* GAO REP., *supra* note 1, at 7.

76. 20 U.S.C. § 1415 (2005). If the dispute goes to court, the impartial ALJ would likely select an appropriate placement, but this increases the time necessary for appropriately placing the child and the contentiousness of the parties' relationship.

zone.<sup>77</sup> Either party may concede whether the offered placement is appropriate simply to avoid potential court costs. If parents and schools are focused solely on their own interests, rather than on the child's, then going to court may be better than any inappropriate placement, since the administrative law judge would be available to select an appropriate placement for the child. If the child were to remain more inappropriately placed while awaiting a slow outcome in court than he would if the parties made an agreement immediately, then going to court might become less desirable for the child because of the costs of lost education in the meantime. Nonetheless, the agents' risk preferences probably explain, in part, why only five of 10,000 formal IDEA disputes reach the hearing stage each year.<sup>78</sup>

*c. Transaction cost/value of time considerations*

Schools and parents must also consider the transaction costs and time required to engage in disputes beyond the mediation or pre-trial settlement conference. Depending on the strength of its case, the parents or the school could end up agreeing to a placement outside the bargaining zone because the costs of going to court are too great. A school runs the risk of not only having to provide the placement demanded by the parents, but also having to pay the parents' attorney's fees.<sup>79</sup> At the point where the school has too much to lose, the school might see its employees' time and its limited funds as too valuable to risk in trying to win and accepting a less than appropriate placement for the child might be better for the school. Likewise, in challenging the child's future placement, parents must consider their child's current placement,<sup>80</sup> the cost of going forward, and the time it will take to get through a hearing. If the parents are arguing for the child to remain in the current placement, then the stay-put provision will be advantageous. If the parents desire a different placement than the child's current placement, however, then the longer the dispute drags on, the longer the child will be stuck in the perceived inappropriate placement. These risks may deter parents from pursuing more appropriate placements. Since these concerns are those of the parents and

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77. KOROBKIN, *supra* note 15, at 68-69.

78. GAO REP., *supra* note 1, at 3.

79. *Id.* at 1. Dispute resolution cost schools over \$90 million in the 1999-2000 school year.

80. With the stay-put provision of the IDEA, children remain in the previously agreed upon placement until the new placement is determined. 20 U.S.C.A. § 1415(j) (2005).

the schools, and not of the child, this again demonstrates the potential principal-agent problems that can arise in this context.<sup>81</sup>

*d. Future transaction considerations*

Finally, both parties know that in the future, they will have to negotiate with one another again, as IEPs are reviewed and redrafted at least annually.<sup>82</sup> Parties' knowledge that future interactions and negotiations are certain should lead to civility;<sup>83</sup> however, this does not always happen.<sup>84</sup> Each party has the incentive to fight hard to demonstrate its commitment to its positions and its willingness to pursue its BATNA.<sup>85</sup> Negotiating with a third-party moderator might remind parties that they represent the same client and can make future transactions less contentious if they agree without further dispute.<sup>86</sup> Here again, however, is the problem that parties might make an agreement that is inappropriate in order to show good faith. Without guidelines, even third party moderators will have trouble helping the parties to shape an appropriate placement.

Mutual use of power, aligned risk preferences, mutual interest in quick dispute resolution, and shared interest in limiting the contentiousness often result in negotiated agreements at mediations and pre-trial settlement conferences.<sup>87</sup> If the negotiation hinges on money and power, however, the child's best interests will become secondary.<sup>88</sup> Negotiating a child's placement, as if it were any other transaction, does not adequately ensure an educationally successful result.<sup>89</sup>

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81. KOROBKIN, *supra* note 15, at 310-13; *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1400 n.5 (9th Cir. 1994) (noting that in placement disputes such as the one at issue in this case, "when combat lines are firmly drawn, the child's interests often are damaged in the ensuing struggle"); Edwards, *supra* note 24, at 153.

82. 20 U.S.C. § 1414 (d)(4)(A)(i) (2005).

83. Parties' desire to establish a reputation for being tough might result in oppositional behavior, which would be better than civility if the child's best interests in a given situation were served by this behavior.

84. See, e.g., Alpert, *supra* note 62. At this stage, parties might already have become too angry and self-righteous to deal professionally with one another.

85. See discussion *infra* section III.

86. KOROBKIN, *supra* note 15, at 345-48.

87. GAO REP., *supra* note 1.

88. See *supra* note 85.

89. See discussion *supra* section II.



### III. THE PROBLEM: FAILURE TO ENSURE THAT PLACEMENTS ARE APPROPRIATE

There is no outside review to ensure that the IDEIA placements generated through negotiation will be educationally appropriate, save for possible review by a court in the event of a dispute. Inappropriate placements are likely to result from the power dynamics, psychological tactics, and an overall failure to negotiate within the bargaining zone, as discussed in Section II above.

#### A. *Bargaining Zone Problems*

Assuming that there are one or more points along the “appropriate placement” spectrum for each child, parties should actively negotiate along that spectrum to select a placement. However, without any objective criteria to define the bargaining zone of placements parties may be unable to determine appropriate options. As agents, they may rationalize their own desires and needs and then confound these rationalizations with those of the child.<sup>90</sup>

#### 1. The Unknown Bargaining Zone

Unlike the sale of a car, where the appropriate price range is easily determined by using the Kelley Blue Book to value and compare similar cars in similar conditions, placement decisions are made on an individual basis with no simple starting points for the negotiating parties.<sup>91</sup> Although children with the same disability, mental capacity, and age might have similar placement needs, the law requires that each child be considered individually.<sup>92</sup> Under the law, the regular classroom is always the presumptively appropriate placement until it is shown otherwise.<sup>93</sup> This presumptive placement idea is analogous to assuming that all five-year-old cars have the same value until proven otherwise.<sup>94</sup> In other words, some negotiations start off with a reason-

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90. KOROBKIN, *supra* note 15, at 311-12; *see also* Clyde v. Puyallup Sch. Dist., 35 F.3d 1396, 1400 (9th Cir. 1994).

91. *See generally* 20 U.S.C. § 1414 (2005) (requiring an individualized education plan be developed for each child with disabilities).

92. 20 U.S.C. §§ 1400-85 (2005); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989).

93. Senate Committee Report on Pub. L. No. 105-17, page 26 (noting that “the law and this bill contain a presumption that children with disabilities are to be educated in regular classes”).

94. *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 2003) (the law does not allow for a school or parent to have its own idea of a presumptively appropriate placement for a child).

able placement already in play, but for other children this regular classroom setting could be entirely inappropriate. If this placement creates in one of the parties an endowment bias or has an anchoring effect, the result could be a long, hard fight as a result of an inappropriate starting point.<sup>95</sup>

The lack of placement guidelines could be particularly detrimental to selecting an appropriate placement where parties are making offers or demands beyond the bargaining zone. Parents of an autistic child, for example, may seek a more expensive, more restrictive private school specializing in serving the autistic, even if this restrictive setting is not substantively appropriate for their child.<sup>96</sup> Alternatively, they might believe that their child will become less disabled if he spends all day in the regular classroom.<sup>97</sup> In either case, if the parents were to convince the school of their position, the child could be wrongly placed.<sup>98</sup> Anticipating a compromise, parents may engage in anchoring behavior, seeking more than even they believe is appropriate in order to achieve the desired compromised placement. When one or the other extremes would have been appropriate, compromise could result in inappropriate placement.

Like parents, schools too, may engage in anchoring behavior. They may propose inappropriate placements for children to minimize the costs associated with providing special classes and services, as well as to lower the parents' expectations. If the child's appropriate placement is too far from what the school has offered, and if the school convinces the parents of its position, then the child could be wrongly placed.

If both parties offer anchored placement proposals outside the bargaining zone, then a compromise between these two unreasonable positions might or might not result in an appropriate placement. It is also possible that one party's appropriate proposal will be pulled away from the bargaining zone by the other's anchoring behavior.<sup>99</sup> If par-

95. See, e.g., Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775, 820-24 (1997).

96. 20 U.S.C. § 1412 (2005) (requiring that a student be placed in the "least restrictive environment appropriate").

97. See, e.g., *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002) (holding appropriate a placement besides the regular classroom for a severely cognitively impaired thirteen-year-old in regular academic classes).

98. 20 U.S.C §§ 1400-85 (2005). The law prefers students with disabilities to have the chance to interact with non-disabled children, so the institution of disabled children would only be appropriate in very limited circumstances. At the other extreme, if a child has severe emotional or cognitive disabilities, it is unlikely that he would be best placed in a class of thirty non-disabled children for all subjects.

99. See generally KOROBKIN, *supra* note 15, at 88-91.

ties proposed appropriate placement options, then a compromise might not be inappropriate. In order to ensure that parties negotiate within this bargaining zone, it is important that both parties understand the extent of the zone.

### *B. Psychology and Social Norms in Placement Negotiations*

When parties negotiate, they may intentionally or inadvertently employ psychological tactics and social factors such as reactance behaviors, attribution biases, anchoring effects, endowment effects, and ideas about fairness.<sup>100</sup> These same tactics and behaviors may also unknowingly affect them.<sup>101</sup> But an educational placement decision is not a business or marketplace negotiation. Placement decisions involve two parties negotiating on behalf of the same client, but with different ancillary concerns. With the shared goal of appropriately placing the child, parties ideally should be open about what placements they think could be appropriate and why they think so. By employing strategic, psychological, and social norm tactics, however, parties may get what they want at the expense of the child's best interest. The psychology of negotiation and agents' own concerns may be incompatible with finding an objectively appropriate placement.

#### 1. Reactance Theory

It would be inefficient and illogical for the parties to discuss every placement available, when very few will be right for a given child. Reactance theory,<sup>102</sup> therefore, may explain why parents feel mistreated in IEP negotiations when the school proposes the placement without investigating what the parents' want. The school may propose one or two placements for the child, but parents may see the half dozen or so options not offered and their choice limited. Whether those other placements are actually appropriate, parents may perceive that the school is working against them. The negotiation may then end in disagreement and require formal resolution of the placement decision, despite the law's aim of reducing disputes.<sup>103</sup>

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100. See generally KOROBKIN, *supra*, note 15.

101. *Id.*

102. *Id.* at 102-03. Reactance theory describes why a party feels disappointed when an option that once seemed available is no longer available, even if the party did not want that option.

103. Though an appropriate placement will likely result from a hearing, amendments to the IDEIA clearly prefer parties to work out placements on their own. 20 U.S.C. § 1415 (2005). Also, parties should be able to find a placement and to agree on it without being

## 2. Attribution Bias

One of the most problematic psychological realities of negotiations between parents and schools is that of attribution bias.<sup>104</sup> As a result of the personal, entrenched positions that parties take and the heated exchanges that can result, parties are often biased in ways that interfere with achieving their mutual goal of selecting appropriate placements. Parents in placement disputes often assume that the school is unethical and unsupportive of their child's needs, even when the school may be proposing a reasonable, appropriate placement.<sup>105</sup> Similarly, school officials often view parents as emotionally blinded about what is actually good for their child, either demanding placements simply because they believe an expensive one must be better, or because they are unable to accept the limitations of their child.<sup>106</sup> As victims of attribution bias, neither party considers that the other party's proposal may be an appropriate one, or alternatively, that the other party's inappropriate placement proposal is simply the result of inadequate information.<sup>107</sup> This attribution bias leads to entrenched positions that interfere with logical decision-making, discussion about placement, and compromise or concession.<sup>108</sup> This is evidenced by the fact that thousands of placements result in formal disputes every year<sup>109</sup> and by the well-known cases involving parents and schools that were unable to find appropriate placements through compromise.<sup>110</sup>

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swayed by their feelings, but without a clear sense of what options are actually available to them (where the bargaining zone lies), parents are likely to react negatively to the perceived limitation on their choice. Given the personal and sometimes emotional issues involved in student placements, it is not surprising to see this predicted result of reactance theory in placement negotiations.

104. See, e.g., KOROBKIN, *supra* note 15, at 353-54.

105. Interview with parents of L.O. (Nov. 2006); Interview with parents of D.S. (Feb., May 2005); Welsh, *supra* note 52, at 622-23, 634-35.

106. Interview with A.M., Teacher (Feb. 2007); see also Welsh, *supra* note 52.

107. See, e.g., Alpert, *supra* note 62.

108. GAO Rep., *supra* note 1.

109. *Id.*

110. See, e.g., *Beth B.*, 282 F.3d at 497-99; *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217-18 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).

### 3. Anchoring and Altering Perceptions of the Bargaining Zone

The strategy of anchoring is common in daily negotiations.<sup>111</sup> As a result, it is to be expected that parties in placement disputes would ask for more or offer less than what they ultimately expect to get or believe is appropriate. In the buying and selling of a car, there is an expectation that the buyer wants the lowest price and the seller the highest. In placement negotiations, however, anchoring is not strategically appropriate unless the parties have already established the bargaining zone and are making anchored offers and counteroffers within that zone.<sup>112</sup> Offers and counteroffers are almost expected to be polarized, so each party assumes that the other is willing to move toward a compromise, and any unwillingness by a party to do so would be seen as undermining the efficacy of the negotiation.<sup>113</sup> In placement negotiations, however, parties are supposed to reach an objectively appropriate placement,<sup>114</sup> and one or both parties may attempt to do so. If one party's offer is anchored, that party may erroneously assume that the other party's offer is as well, and that a compromise is therefore appropriate. If the party offering the appropriate placement refuses to compromise, then the other party might likewise refuse to budge, creating a standoff. Alternatively, agreement to compromise in this situation may result in inappropriate placement of the child.<sup>115</sup>

### 4. Endowment Effect or Status Quo Bias<sup>116</sup>

The endowment effect is present in placement negotiations and can increase a party's sense of loss if an undesired placement change occurs.<sup>117</sup> Parties that believe a child is appropriately placed, therefore, are unlikely to agree to a new placement. The status quo bias can also affect parties by causing them to overvalue maintaining the cur-

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111. KOROBKIN, *supra* note 15, at 87-91.

112. *See generally* KOROBKIN, *supra* note 15. Convincing a buyer to pay more for a car benefits the seller without harming the buyer (since no buyer would pay more than his RP), so the price will be within the bargaining zone. In a placement dispute, however, if anchoring leads to a placement suggestion beyond the bargaining zone, the parties might eventually agree to a compromise without knowing it is beyond the zone, and this to the detriment of the child.

113. *Id.* at 184-85.

114. 20 U.S.C. § 1414(d) (2005).

115. Edwards, *supra* note 24, at 146 (noting that "the ability to come to a final resolution does not necessarily equate to a good resolution that is appropriate for the child, or in compliance with the requirements of FAPE").

116. KOROBKIN, *supra* note 15, at 76-80.

117. KOROBKIN, *supra* note 15, at 80. The endowment effect is the increased value an individual assigns to objects or services once he possesses them.

rent placement, rather than agreeing to a change.<sup>118</sup>18 The IDEIA, in fact, has a “stay-put” provision,<sup>119</sup>19 so that when a party disagrees with the other’s proposed placement, the existing placement prevails until the dispute is resolved. The law values what the child already has over a disagreed-upon change,<sup>120</sup>20 thus empowering the party who supports the current placement.

### 5. Splitting the Difference

Finally, social norms of fairness, such as “splitting the difference,” can affect how decisions are made and what placement results.<sup>121</sup>21 Because “splitting the difference” is viewed as a fair way to come to agreements in negotiations,<sup>122</sup>22 parties in placement disputes will have perceived pressure to compromise whether or not one party actually recommends an “appropriate” placement, and a compromise may move away from the appropriate placement.

Splitting the difference is often suitable in business negotiations; one party might get less of the negotiated cooperative surplus, but the deal would still be within the bargaining zone.<sup>123</sup>23 In a placement negotiation there might be a similar cooperative surplus, if there were, for example, three appropriate placements over which to negotiate. The similarity ends there, however. There is not necessarily a reasonable middle ground between two qualitatively different yet appropriate placements.<sup>124</sup>24 The bargaining zone may be a set of distinct points, not a continuum, and so a hybrid of two appropriate proposals could result in an educationally unworkable placement.

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118. *Id.* at 84. When negotiating parties favor terms that do not require any action on their part, even when they might not benefit from this, then there exists a status quo bias.

119. 20 U.S.C. § 1415(j) (2005).

120. *Id.*

121. KOROBKIN, *supra* note 15, at 354

122. *Id.*

123. *Id.*

124. For example, appropriate placements for a child needing significant individualized attention might be taking classes in a school for students with special needs or being in a special day class within a regular school. Spending part of the day in each school, as a compromise or hybrid of the two appropriate placements, however, would not necessarily be appropriate for the child.

C. *Parties Do Not Understand the Purpose and Strategies of IDEIA Negotiation*

1. Information Exchange Problems

Mediation is meant to bring about a better understanding of the other party's position and to facilitate compromise within the bargaining zone,<sup>125</sup>25 but parties in IDEIA disputes often do not accomplish these aims.<sup>126</sup>26 Parties may not recognize the purpose of the negotiation or understand which negotiation strategies will be effective and appropriate, and may therefore be unprepared to allow mediation to operate effectively. Parents generally want the school to understand their position, but worry less about understanding the school's position.<sup>127</sup>27 Similarly, schools are more concerned with their position being understood rather than understanding the parents' position.<sup>128</sup>28 Each party may view mediation as an opportunity to persuade the other side, rather than as an opportunity to carefully consider the child's best interest from all perspectives. The parties may fail to fully explore appropriate options because they fail to listen to each other and to understand that the purpose of the mediation is not to serve the agents' interests, but to determine and select an appropriate placement.

Failure to communicate in IDEIA mediations occurs at times because parties attribute ulterior motives to each other, and therefore fail to fully consider and understand the other's positions.<sup>129</sup>29 At other times, each party is working so hard to make its own point (believing its opponent would capitulate if only it understood this party's position) that the party fails to listen.<sup>130</sup>30 Unfortunately, information exchange may not be used effectively to establish a bargaining zone of appropriate placements if parties are not open to it.<sup>131</sup>31

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125. KOROBKIN, *supra* note 15, at 344-45.

126. GAO REP., *supra* note 1.

127. Welsh, *supra* note 52, at 621,627.

128. *Id.* at 625-28.

129. See Edwards, *supra* note 24, at 152.

130. *Id.* at 621, 633-34.

131. Edwards, *supra* note 24, at 153. Assuming that some parents want certain placements for unadmitted emotional, protective reasons and that many schools want certain placements for unadmitted administrative ease or cost-savings, an agreement based on these stated positions may result in the best educational arrangement for the student being obscured. Instead, these parties are likely to come to an agreement that misses the child's educational interests in favor of the negotiators' hidden agendas. Although such a placement could end up also being appropriate under the law, there is no assurance that this will happen.

## 2. Preparing for Negotiation

Parties need more information in order to avoid inappropriate placements that can result from insufficient preparation and failure to understand the purpose of negotiating placements. When each party objectively prepares before negotiating,<sup>132</sup>32 has considered its opponent's position, and has evaluated whether these are aligned with the child's best interest, then negotiation can be an effective way to determine placements.<sup>133</sup>33

Both parties need to look objectively at the facts and how these facts will direct the negotiation. They must first align their own interests with those of the child. They can then begin to investigate what sorts of placements have been used successfully for children with similar disabilities. Parties should also determine the range of possible placements and services available within the school district.<sup>134</sup>34 In addition, they should consider the expectations for non-disabled children at the same grade level in order to determine where the child with disabilities can benefit educationally. Finally, both parties need to review the law to help them understand how their respective court of appeals district currently defines "appropriate." Gathering this information in preparation for negotiation equips each party to focus more effectively on the interests of the child.

## IV. CHANGING THE LAW TO AVOID AGREEMENTS OUTSIDE THE PLACEMENT BARGAINING ZONE

The goal of negotiating placement decisions is for the child to be appropriately placed,<sup>135</sup>35 and therefore parents and schools together should be enabled to find a way to do this. More information about where the bargaining zone lies would facilitate this goal. If parties begin with an objective, well-researched set of guidelines (much like the Kelley Blue Book in used car sales), then negotiations would be more productive. Both parties in IDEIA negotiations, theoretically, should

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132. Each party also needs to engage in internal preparation, helping it to determine its own BATNA and RP, as well as estimating its opponent's. However, without any criteria to determine a bargaining zone, this may be difficult.

133. Alpert, *supra* note 62. Much literature available to parents is misleading. Some sources instruct parents to inquire about other children's placements, despite children needing different things. Others tell parents simply to be confrontational.

134. *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 161-63 (8th Cir. 1987) (holding creation of a program for this child unnecessary where a specialized school was available). This suggests that if any appropriate placement option already exists, courts are unlikely to force a school to provide others.

135. 20 U.S.C. § 1412 (2005).



want the same thing for the same client. If they were aligned as partners rather than competing as adversaries, they could more effectively focus on the child's placement, as intended by the law.<sup>136</sup> Parties' difficulty in determining appropriate placements could be reduced if the Department of Education were to promulgate guidelines to serve as starting points for negotiation. An outside educational agency making these determinations would reduce the contentiousness that permeates placement decisions.

### A. *Department of Education Guidelines*

The Department of Education currently promulgates the IDEIA regulations and should set forth guidelines regarding appropriate placement of children with disabilities. Parents and schools could then consult these guidelines to determine whether their placement "offers" or "demands" fit within the parameters of a realistic bargaining zone, establishing a "market price." A placement agreement must be reached, so it is essential that a bargaining zone be defined so that parties can work toward agreeing on a substantively appropriate placement for the child without the sense that the other party is being "unfair."

#### 1. Departmental Guidelines Would Improve Parties' Ability to Negotiate

For the guidelines to be objective and useful, they should be based on input from specialists in education, medicine, and disability. For example, based on what the team of specialists might determine to be appropriate for a student with similar needs under the guidelines, an eleven-year-old child with severe autism might have three presumptively appropriate placements: a specialized school, a special education class, or placement with a one-on-one aide in a regular classroom. These objective guidelines would be advisory. They would not completely define the range of options, but would help establish the bargaining zone and reduce perception of mistreatment by opposing parties.

#### 2. Placement Disputes, Placement Challenges, and the Guidelines

If a party wanted to challenge a Department of Education suggested placement offered by the other party, then it could pursue the

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136. 20 U.S.C. § 1400 *et. seq.* (2005).

traditional channels of dispute resolution.<sup>137</sup>37 If both of the parties disagreed with the placement options, then they could reach an agreement, place the child, and file a notice of their choice and reasons for it with the Department of Education. This would avoid over-intervention of bureaucratic standards and would also put some outside pressure on parties to consider and justify why none of the recommended placements were appropriate for the child.

External guidelines could improve negotiations by reducing the extent to which schools' and parents' self-serving interests might otherwise interfere with appropriate placement options. For example, parents may unrealistically want to believe that their child is capable of doing what others can do, and schools may want to avoid the expense of providing specialized classes or services for the child.<sup>138</sup>38 In such a situation, the child could end up wrongly placed and learning little in a regular classroom because the school and parents, absorbed by their own concerns, have failed to recognize their obligations as agents for the child. Thus, having guidelines would force the parties to justify their placement choice, which might lead them to reconsider such inappropriate decisions. Additionally, requiring parties to file notices explaining the reasons for selecting placements, other than those suggested, would enable the Department of Education to see where its guidelines need to be reconsidered.

## V. CONCLUSION

The IDEIA's procedural requirements, including having parents and schools working together to determine what placement is best for a child seem to work most of the time, as evidenced by the small number of disputes each year. There are no assurances, however, that this arrangement leads to substantively appropriate results, as parents and schools are often driven by their own concerns rather than working together for the interests of the child. Additionally, with no alternative to trial and error for determining if a placement is appropriate for a child, the parties have no expert standard to determine what would be appropriate for a child when negotiating his placement.

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137. Arguably, educational placement decisions are better left to education experts than to judges or hearing officers (*see, e.g.*, *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002)), so it would make sense to have those with knowledge about children, disabilities, and education hear placement challenges. Due to the frequent disputes about procedural issues and other legal questions, a legal expert would also be needed. This team of experts would ensure that placements would be sensible.

138. Edwards, *supra* note 24, at 153; *see, e.g.*, *Beth B. v. Van Clay*, 282 F.3d 493, 495-96 (7th Cir. 2002).

While the law anticipates that having parents and schools both advocate for the child will serve the child's interest, the parties' biases, lack of information, power plays, and personal interests often interfere with achieving that end. The parties might feel that a negotiated compromise is a success without knowing where the bargaining zone of appropriate placements lies. The result could be inappropriate for the child. In order to serve the child's interests, parties themselves need to objectively prepare for negotiation; and the Department of Education needs to provide parents and schools with guidelines to establish a starting point from which parties can determine a substantively appropriate placement for each child.

While guidelines will assist most parties in determining appropriate placements for children, creating guidelines and implementing them could be difficult, costly, and politically thankless. One major challenge would be to identify the sorts of experts needed to create the guidelines. It could also be difficult to determine appropriate placement for those children who do not fit the mold set out by the guidelines. The cost of developing the guidelines could be great, but if the guidelines reduce the number of disputes and inappropriate placements, then their development would be cost-effective.

Until the Department of Education promulgates guidelines to help parties negotiate placement within the bargaining zone, parties will have to help themselves. By objectively assessing the child's abilities, disabilities and situation, parties can begin to move themselves into a bargaining zone of appropriate placements.