

Alternative Dispute Resolution in Special Education

by Laura A. Athens

In the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA 2004"), Congress reaffirmed and expanded its commitment to alternative dispute resolution as a preferred means of resolving special education disputes. The Act, which was reauthorized and signed into law on December 3, 2004, contains not only voluntary mediation provisions that were in a prior version of the statute, but also provisions for mandatory early resolution sessions.¹ In IDEA 2004, Congress specifically found that parents and schools should have "expanded opportunities to resolve their disagreements in positive and constructive ways."² The legislative history of the Act indicates that Congress broadened ADR opportunities to restore trust and foster cooperation between parents and schools, encourage expeditious resolution of disputes and prevent disagreements from escalating into costly litigation.³

IDEA Purposes and General Provisions

In exchange for federal funding, IDEA imposes certain obligations on public school systems for the benefit of children with disabilities. The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living."⁴ This purpose is implemented through comprehensive, periodic, multi-disciplinary evaluation of the child and development of an annual individualized education program (IEP).⁵ An IEP team consisting of the parents, school personnel, other interested persons and the child, if appropriate, meet to establish educational goals and determine appropriate educational programming and services for the child.

Children with disabilities are eligible for "related services" such as speech, occupational and physical therapy, psychological and social work services, specialized transportation and other professional services that are necessary to assist them in benefitting from special education.⁶ They are also entitled to "supplementary aids and services," which enable them to be educated with nondisabled children to the maximum extent appropriate.⁷

IDEA provides a wide range of procedural protections for children with disabilities and their parents. The parents

have a right to be notified of any change in the child's placement, examine educational records, participate in meetings regarding evaluation and educational placement, obtain an independent educational evaluation at the expense of the educational agency and present disputes at "an impartial due process hearing."⁸ After administrative review, the parents or school district may bring a civil action in state or federal court.⁹

Disputes arise concerning eligibility for special education, evaluation procedures, educational placement, provision of related services and supplementary aids or services, as well as behavioral and disciplinary issues. A parent or school district requesting a due process hearing must provide the other party with written notice describing the nature of the problem, including relevant facts, and a proposed resolution to the extent that a resolution is known.¹⁰ The due process notice helps to focus the issues and provides an initial framework for discussion.

Mediation Provisions

Voluntary mediation provisions were initially referenced in a 1997 version of IDEA. To receive federal IDEA funding, state and local educational agencies must make mediation available as a means for resolving special education disputes. Participation in mediation is "voluntary," and may not be used to delay or deny an administrative due process hearing. Educational agencies may establish procedures to offer parents or school personnel who choose not to participate in mediation an opportunity to meet with a disinterested party who can explain the benefits of mediation.¹¹

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Mediation must be conducted by a "qualified and impartial mediator who is trained in effective mediation techniques."¹² The state is required to maintain a list of qualified mediators and bear the cost of mediation. The mediation must be scheduled in a timely fashion at a location that is convenient to both parties. Discussions during mediation must be kept confidential and may not be used as evidence in any subsequent due process or civil proceeding.¹³ As a matter of practice, it is wise to require the parties to sign a confidentiality pledge at the commencement of mediation so that it is clear that regardless of whether an agreement is reached, confidentiality must be preserved. The purpose of confidentiality is to encourage the free exchange of information without fear that the information may be used against a party in the future.

The new version of IDEA contains specific provisions requiring that any agreement reached through mediation be set forth in a written legally binding agreement. Pursuant to the statute, the agreement must contain the following three elements: (1) a provision that all discussions during mediation shall be kept confidential, (2) signatures by the parent and a representative of the school district that has authority to bind the district, and (3) a statement that the agreement is enforceable in any state court of competent jurisdiction or federal district court.¹⁴

IDEA 2004 makes it clear that mediation is not just for resolving requests for a due process hearing, but may be requested at any time to resolve special education disputes. Early use of mediation often resolves disagreements and obviates the need for a due process hearing.

The Michigan Revised Administrative Rules for Special Education also provide for mediation of special education disputes. The mediator must be mutually agreeable to the parties.¹⁵ A prior version of the Michigan special education rule prohibited a due process hearing officer from mediating and hearing the same case.¹⁶ The current version does not contain such a prohibition. Because of the potential conflict between the neutral role of the mediator and adjudicative role of the hearing officer, many hearing officers who also serve as mediators offer to recuse themselves at the request of either party if the matter is not fully resolved through mediation.

Resolution Session Provisions

IDEA 2004 includes new provisions mandating a preliminary meeting between the parents and selected school staff as a prerequisite to a due process hearing. A "resolution session" must take place within 15 days of the school district's receipt of a parent's request for a due process hearing. A representative of the district who has decision-making authority must attend the meeting. To promote a more level playing field, the school district attorney may not attend the meeting unless the parents are accompanied by legal counsel. Nothing in the statute precludes a mediator from participating in the resolution session.

The resolution session provides the parties with an early informal opportunity for a face-to-face discussion

that may be effective in resolving the dispute and preventing the conflict from escalating. The resolution session is mandatory unless the parents and the district agree in writing to waive the meeting or agree to participate in mediation.¹⁷ If the parties already know that the issues require more than an informal discussion and require the presence of a neutral third party, then mediation may prove to be a more productive option. An agreement reached through a resolution session is voidable by either party within three business days of its execution. If the matter is not resolved to the parents' satisfaction within 30 days of the district's receipt of the complaint, then the case may proceed to a due process hearing.¹⁸

Preparing for Special Education Mediation

In preparation for a special education mediation, it is essential to carefully choose an experienced, knowledgeable mediator. Mediation is more likely to be successful if both parties feel confident in and trust the impartiality and expertise of the mediator. Because the special education field and the applicable laws are complex, it is also helpful to have a mediator who is well versed in the special education vernacular and the respective legal rights of the parties involved.

It is crucial to ensure that the key players are available to participate in mediation. Typically, the key players include the parents, a school administrator with knowledge about district programs and authority to commit resources, and the child's teacher or other service provider. The special education providers often are knowledgeable about the child's unique strengths and educational needs. Because the mediator's role is to facilitate the parties in reaching a mutually agreeable resolution and not to provide legal advice, both parties may also wish to have legal representation at the mediation. Ideally, the mediation should not include a huge cast of characters, especially those unfamiliar with the child. Too many participants make it more difficult to clearly define the real issues and to reach a consensus.

Prior to the mediation, the mediator should consult with the parties and their representatives to discuss who will participate in the mediation and to ensure that there is room for compromise. Both parties must be willing to relinquish their positions and to consider the other party's point of view. If the positions are entrenched or mutually exclusive, there may be no room for compromise. Both parties must be committed to making a good-faith effort to resolve the dispute. Mediation should not be motivated by some other improper purpose such as a fishing expedition. Selection of a mutually convenient time and place for the mediation allows the parties to focus on negotiation, rather than being distracted by other concerns.

Advantages of Special Education Mediation and Early Dispute Resolution

Mediation is particularly beneficial in the special education arena because it permits the parties who know the child best to cooperatively discuss the issues and

generate a variety of educational options. It allows the parties to express their interests and concerns directly to each other, rather than through the filter of structured legal argument. It promotes communication, collaboration and joint problem solving. Instead of having a decision imposed by a third party, the parties retain decision-making authority. Together, the parties are able to identify solutions that neither party would have contemplated alone and that would not have been considered at an IEP team meeting or a due process hearing. When the parents' familiarity with the child is joined with the school personnel's expertise, innovative and enduring solutions are often reached. Mediation allows the parties to craft their own unique agreement that satisfies the interests of both parties.

Mediation is more expedient in terms of time, effort and resources. Typically, a special education mediation lasts one day or less. After mediation, the parties can refocus their energies and efforts on the child rather than litigation. Teachers and other school personnel can return to the classroom. Parents can concentrate on providing for the child's basic needs and supporting his or her education. It is not unusual for special education due process hearings to last five days or more. Under the prior version of IDEA, even though a due process hearing is supposed to be completed within 45 calendar days, it often takes months to even schedule a hearing. After the due process hearing, either party has the right to appeal to the Michigan Department of Education. After exhausting administrative remedies, they may file a civil action in state or federal court. The delays encountered and costs incurred can be extraordinary for both parties and in the interim the child's fate is held in limbo while the parents and school staff are embroiled in a contentious, time-consuming battle. Under a provision of IDEA known as "stay put," the child does have a right to remain in his or her current educational placement during the pendency of proceedings; however, this may work for or against either party depending on the nature of the dispute. Ultimately, neither party may be satisfied with the result imposed by a hearing officer or judge. If the parents prevail, the school district may be held responsible for reimbursement of the parents' legal fees. Even if the school district prevails, the costs of litigation are exorbitant. Limited public resources

that could have been devoted to educational programming and personnel development are spent on litigation.

Mediation offers the school personnel and parents an opportunity to fashion their own unique resolution taking into account the needs and concerns of both parties. When the parties are actively involved in formulating their own mediated agreement, they are more invested in the result, more likely to comply with the agreement and less likely to pursue future litigation on the same issues. Mediation is particularly appropriate in special education disputes because the parties ordinarily will have a continuing relationship, and share a common goal of promoting the educational development of the child even though they may not agree on how to achieve that result. Because the mediation process facilitates communication and cooperation, it preserves the relationship by building trust and rapport, and teaches fundamental negotiation skills that can be utilized in the future. Innovative, enduring and mutually satisfying results are more likely to occur as a result of the mediation process.

Other Forms of ADR

Although IDEA 2004 does not contain provisions for arbitration, a House bill to reauthorize IDEA contained an option for voluntary binding arbitration in lieu of a due process hearing.¹⁹ The arbitration provision did not become a part of the final version of the statute; however, the parties to a special education dispute may voluntarily choose binding or non-binding arbitration. In arbitration, a neutral third party reviews relevant documents, receives testimony from key witnesses presented by both parties, and renders a decision. Non-binding arbitration may assist the parties in settlement negotiations and may help to narrow the issues for hearing. Binding arbitration provides a more expeditious and less expensive option for resolution than the typical litigation process. In binding arbitration, there is typically no opportunity for appeal or only a very limited level of review. When both parties are interested in resolving a matter within a relatively short period of time, arbitration can be a very useful option.

A facilitated IEP is a form of early alternative dispute resolution. A trained neutral mediator facilitates the IEP team meeting by ensuring that the meeting proceeds in an

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orderly fashion, remains focused on the child's educational needs and provides an opportunity for each participant to meaningfully participate in the IEP process.

IDEA also provides for an independent educational evaluation (IEE) when the parents disagree with the school district's evaluation. The IEE is conducted by a professional independent of the school district.²⁰ It may involve a psychologist, speech therapist, occupational therapist, physical therapist or some other educational professional. The IEP team must consider the IEE in reviewing and revising the child's IEP. Typically, the conclusions and recommendations contained in the IEE are not binding on the parties; however, the parties may choose, in advance, to be bound by an IEE determination.

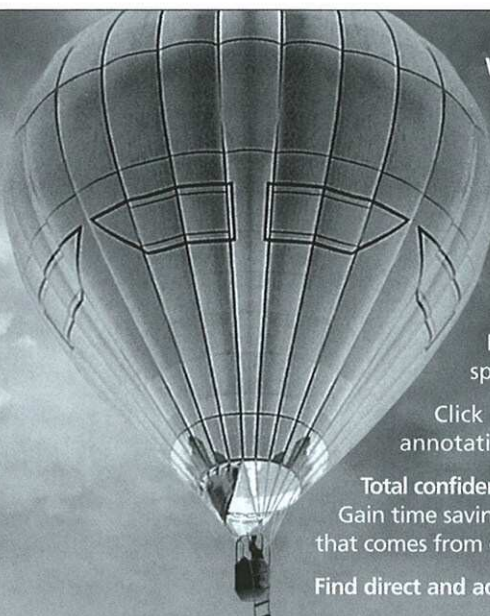
Disputes that arise in the special education arena are particularly well suited to resolution through ADR. ADR promotes early, expeditious and economical resolution of special education disputes and is consistent with the Congressional intent that parents and schools work in cooperative and collaborative fashion on behalf of children with disabilities. ADR is a win-win proposition for parents and school districts. It facilitates the rebuilding of trust and rapport that are crucial in ensuring that children with disabilities receive a free and appropriate public education and that school personnel are able to focus their energies on providing quality special education programming and services.

Laura A. Athens is a sole practitioner in Farmington Hills, whose practice focuses primarily on education law. She is chair of the Oakland County Bar Association Alternative Dispute Resolution (ADR) Committee and a past chair of the Solo/ Small Firm Committee. Ms. Athens has served as an Adjunct Professor at Wayne State University Law School teaching education law and health law. She is a Special Education Hearing Officer, a Michigan Department of Career Development Rehabilitation Services Hearing Officer, and she mediates special education matters.

Footnotes

- 1 Most of the provisions of the IDEA Improvement Act of 2004, P.L. 108-446, will go into effect on July 1, 2005.
- 2 Section 601(c)(8).
- 3 H.R. 1350 Conference Report, Reducing Unnecessary Lawsuits and Litigation in Special Education, November 17, 2004.
- 4 Section 601(d)(1)(A).
- 5 Section 614(a), (b) and (d).
- 6 Section 602(26).
- 7 Section 602(33).
- 8 Section 615(b)(6) & (f).
- 9 Section 615(i)(2).
- 10 Section 615(b)(7).
- 11 Section 615(e).
- 12 Section 615(e)(2)(A)(iii).
- 13 Section 615(e)(2)(A) & (B).
- 14 Section 615(e)(2)(F).
- 15 Michigan Revised Administrative Rules for Special Education, R340.1724d (November 2002).
- 16 Michigan Revised Administrative Rules for Special Education, R340.1725 (April 1997).
- 17 Section 615(f)(B).
- 18 Section 615(f)(B)(ii), (iv).
- 19 House Bill #1350.
- 20 Section 615(b)(1).

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