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IN THIS ISSUE

Dispute Resolution in
Special Education Cases

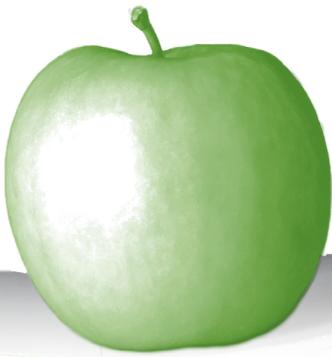
Restorative Justice

Peer Mediation



Collaborating for Our Children's Future: Mediation of Special Education Disputes

By Philip Moses and Timothy Hedeon



The parents of Lisa, a fifth-grader, believe she should be eligible for special education services due to her learning disability. Her parents have tried to establish her eligibility for two years, but twice the school district has said that Lisa is not eligible for services. Lisa's parents feel strongly that eligibility is the only thing that will ensure that the school will be responsible for meeting Lisa's needs. The district special education

director says the current effort by Lisa's parents is terribly misplaced and is offended that the care and attention the school has given Lisa's education is going unnoticed. The school psychologist says that Lisa's academic performance is within normal limits for her age and grade. Using the results from recent state tests and teacher reports of daily class work, the district maintains that Lisa does not need special education services. Both the parents and the district are ready to go to a due process hearing on the matter.

The mother of Jamie, a fourth-grade student who has mild cerebral palsy and developmental delays, wants Jamie to attend her neighborhood school and be in a regular education class. She is convinced that Jamie learns best when educated with children who do not have disabilities. While Jamie does not have any behavioral problems, her mother is worried that she will develop them. Jamie's mother threatens to file a complaint accusing the district of violating the law. The school district wants Jamie to stay at the district's special education facility, certain that Jamie's current placement is appropriate and that she could not be successful in a

regular education classroom. They base this opinion on the severity of her disability and her need for individual attention and instruction. The district also believes that this placement meets the least restrictive environment requirements of the law.

The parents and school district of Michael, an 8-year-old who has autism spectrum disorder, are finding it challenging to reach agreement on an educational placement for Michael for the upcoming school year. So far, Michael has gotten all of his education and related services at home. His parents do not feel that he is ready for an education that is not home-based and are worried that he will not be successful if he is mainstreamed with other students. The parents want to continue his one-on-one program at home and do not want to "experiment" by putting Michael in a regular school setting. The school district is concerned that if Michael continues to be educated with one-on-one tutoring at home, he will miss important social learning that can only happen by being with other students. The district believes Michael is now ready to be in school with his peers. Both the parents and special education director agree to go to mediation to resolve the matter.

These three situations are all based on real events, and they each resulted in vastly differing outcomes.¹

In Lisa's case, the parents filed a due process complaint that ultimately resulted in a hearing that, for both sides, was costly in financial terms as well as long-term damage to their relationship. Additionally, the school district attorney believes the due process hearing officer's decision was flawed and is contemplating filing an appeal in federal court. The due process experience as a whole — including filing the complaint, working within the rigidity of the timeline, and not collaborating on a final outcome — makes it difficult for Lisa's parents and the

school district to work together in the future, regardless of which party ultimately prevails.

In Jamie's case, the parents submitted a written complaint to the state education agency. An investigator will review documentation related to the complaint and likely interview people who have knowledge of Jamie's situation. The investigator will make findings and a determination based on special education and early intervention law and regulations, possibly pushing the unique education needs of Jamie to the background. Those who know Jamie's special needs best, i.e. her parents, educators, and service providers, are now reliant on a complaint investigator to make a determination on what is best for a student who he or she has never met.

However, in Michael's case, the parents and the special education director went to mediation with a mediator supplied by the state. Here, the important concerns related to Michael's transition from full-time home-based educational programs to school-based services were elicited by the mediator and shared by both the parents and school. The parents and special education director were able to address this issue and develop a plan that includes a trial period with a mix of in-home tutoring and regular classroom placement with appropriate support. The parents and educators retained control over Michael's educational program, and their collaborative effort helped forge a stronger partnership that will yield positive results throughout his years as a student enrolled in the school.

Special education disputes are often intense and costly to both parents and schools. Marked by strong emotions, complex regulations, and multiple interested parties, these disputes can consume considerable time and expense for all involved. Two additional factors — the parties' likely long-term relationship and their shared interest in every child's education — lend these disputes to collaborative and non-adversarial dispute resolution processes.

Legislation toward Collaboration

Today, more than six million children are identified as having a disability under the law, allowing them to seek accommodations and additional services that ultimately support beneficial educational outcomes. Recognizing the certainty of conflict between parents and school personnel,² Congress set forth formal procedures and mechanisms for dispute resolution, initially in 1975

with the Education for All Handicapped Children Act, then in 1990 with the Individuals with Disabilities Education Act (IDEA), and most recently in 1997 and 2004 with reauthorizations of IDEA.³ Congress also indicated its strong preference for less reliance on the adversarial and contentious methods found in the statute — such as due process complaints and written state complaints — in favor of the more collaborative methods of mediation and facilitation: "Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways."⁴ Parents and schools are well served when states invest in the prevention of conflicts, in the early management of disagreements, and in collaborative conflict resolution processes.

Disputes most commonly revolve around the design and delivery of the educational programs and services for a student with disabilities. Using the language of IDEA, these disputes often are related to the delivery of a "free and appropriate public education" as well as whether the student is receiving educational services in the "least restrictive environment" (often known as "mainstreaming"), fundamental rights accorded all children with disabilities. Intractable disagreements around these matters result in a breakdown first in communication between the school and the family and, ultimately, in their relationship. As a result, deliberations about the student's educational program are subsequently burdened with tension.

An emerging body of literature suggests a number of benefits that elevate collaborative dispute resolution mechanisms such as mediation over more costly means of resolving disputes (e.g., written complaint investigations, due process hearings, and litigation). These documented benefits include greater degrees of parental satisfaction, frequent resolution of disputes prior to a hearing, reduced financial burden to states in managing local level disputes, improved working relationships between families and educators, and improved progress of children in schools.⁵

While the use of appropriate dispute resolution processes continues to increase, challenges remain. Requests for due process hearings and the filing of state complaints, the two dispute resolution processes originally required under federal statute, number in the tens of thousands each year.⁶ Mounting evidence suggests that the more legalistic procedures lead to adversarial relationships, favor school districts, result in financial and emotional costs to families and schools, and negatively impact state and local agency budgets and services.⁷



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Since 1998, the Office of Special Education Programs (OSEP) at the U.S. Department of Education has funded the Center for Appropriate Dispute Resolution in Special Education (CADRE) as the national dispute resolution technical assistance center. Since its inception, CADRE has responded to two main challenges: to help states comply with the procedural safeguard provisions of IDEA; and, equally important, to help state systems, local education agencies, parent organizations, families, and practitioners increase their capacities to support and carry out collaborative planning and problem-solving to benefit children with disabilities. CADRE activities have increased the nation's capacity to effectively resolve special education disputes, reducing the use of expensive adversarial processes. CADRE's major emphasis is on encouraging the use of mediation, individualized education program (IEP) facilitation, and other collaborative processes as strategies for resolving disagreements between parents and schools about children's educational programs and support services.

While many of CADRE's activities are of a technical nature, these activities are grounded in a strong belief that families, educators, students, and their educational programs benefit when adversarial encounters are avoided and differences are resolved through positive communication and collaboration. CADRE activities have facilitated increased and effective use of mediation, IEP facilitation, and other alternative dispute resolution processes, all of which has resulted in a reduction in the financial, relational, and emotional costs of more adversarial procedures.

CADRE has also helped broaden the range of appropriate dispute resolution procedures in special education and contributed to an increasing nationwide shift away from formal and legalistic confrontation toward an emphasis on early dispute resolution, strengthened problem-solving skills, and increased mutual trust between school personnel and families. A national survey sent to all special education units of state education agencies concluded that expanding the provision of alternate dispute resolution processes not specifically required under IDEA showed great promise for reducing the human and financial costs of more legalistic dispute resolution processes.⁸

The reauthorization of IDEA in 2004 marked the formalization of two collaborative dispute resolution approaches in the statute, demonstrating Congress' clear understanding of the importance of collaborative relationships among educators and families of children with disabilities. Along with procedural safeguards that give parents the opportunity to file written state complaints and due process complaints, IDEA '04 requires states to expand the use

of mediation to allow parties to resolve disputes involving any matter under IDEA without the need to invoke any other procedure. A provision was also added to the statute requiring an opportunity for an informal meeting between families and educators or service providers. Such resolution meetings are now available so that parents and the local education agency have an opportunity to resolve a due process complaint and avoid a time-consuming and costly hearing. In addition to the methods of dispute resolution specifically required under IDEA, there are a variety of more informal or early resolution practices that are used to resolve disputes at the local level. In the *Analysis of Comments* that precede the final regulations for Part B of IDEA '04, the U.S. Department of Education notes that the early identification and resolution of disputes would benefit families and educators.⁹ The hope expressed by Congress in its support for early resolution practices is shared by parent leaders and educators throughout the nation. This expanding continuum of early dispute resolution processes represents less costly means of resolving complaints than due process hearings and written complaints and can help build more positive and effective relationships between families and educators. Ultimately, the desired outcome for such processes is improved results for children with disabilities.

A Continuum of Processes and Practices

Both the requirements of IDEA and the kinds of "positive and constructive" approaches preferred by Congress are reflected in CADRE's Continuum of Dispute Resolution Processes and Practices (Continuum). Many dispute resolution scholars, practitioners, and system designers will be familiar with the general framework of CADRE's Continuum as such a continuum has been used as a conceptual model in the field of dispute resolution for a number of decades. CADRE's Continuum (see Figure 1) graphically depicts the range of dispute

Figure 1

Stages of Conflict	Stage I	Stage II	Stage III	Stage IV	Stage V
Levels of Intervention	Prevention	Disagreement	Conflict	Procedural Safeguards	Legal Review
Assistance/ Intervention Options	Parent Engagement Participant & Stakeholder Training Stakeholder Council Collaborative Rule Making Parent to Parent Assistance Case Manager Telephone Intermediary Facilitation	Mediation Models Ombudsperson Third-Party Opinion/Consultation Resolution Meeting	Mediation under IDEA Written State Complaints Due Process Hearing Hearing Appeal (Two-Tier Systems)	Litigation Legislation	
Dimensions that help clarify placement of the options along the Continuum	Third-Party Assistance			Third-Party Intervention	
	Decision Making by Parties			Decision Making by Third-Party	
	Interest-Based			Rights-Based	
	Informal & Flexible			Formal & Fixed	

prevention and resolution options that might be offered by a state and arranges these options into succeeding stages of intensity or levels of intervention. Dimensions such as “rights-based” versus “interests-based” and “informal and flexible” versus “formal and fixed” are included at the bottom of the model to assist the user in understanding placement of the option, and more importantly, its relationship to other processes. While required mechanisms (those found in Stage IV Procedural Safeguards) must be provided, states strongly benefit from investing in dispute prevention and earlier collaborative conflict management methods. Over time, the Continuum has evolved to the left, that is, additional upstream and innovative dispute prevention and resolution processes have been developed to avoid more costly options, to keep decision making closer to the student, and to build more collaborative partnerships between family members and school systems.

Often a disputant will invoke a process found under Stage IV, i.e., file a due process complaint, and subsequently be referred to an option found under Stage II or III. For example, in Lisa’s case, once a due process complaint had been filed, a state could have referred the parents and school to a number of processes including mediation, or neutral third-party consultation such as an advisory opinion process or an ALJ settlement conference where the merits of their positions are explored. The advisory opinion process allows the parents and school to seek a non-binding opinion based on a scaled-down version of a hearing while an ALJ settlement conference provides a facilitated approach where the expertise of the ALJ is brought into the process. Both aim to avoid the costly expense of a due process hearing and the resulting damage to the relationship that is typical of adversarial dispute resolution processes. In Jamie’s case, the state could have suggested that the parents and school district bring a facilitator into Jamie’s IEP meeting where her educational programs would be decided. Here, the facilitator could have helped the IEP team members address the issues raised in the written state complaint, including the location of Jamie’s services, and avoid an investigation and subsequent report that may address fairly narrow legal grounds but not necessarily her deeper educational interests.

To be sure, special education disputes *do not* always evolve in linear fashion starting at an early stage and moving towards a more formal process, although as with most disputes, they tend to escalate over time if not appropriately managed. The Continuum provides a conceptual framework for state and local approaches to dispute resolution. While the procedural safeguards must be in place for all states, these legally-bound processes by themselves do not fully address conflicts and disagreements that are likely to occur in normal parent-provider relationships. These upstream processes represent

“positive and constructive” methods to resolve differences that can build and strengthen relationships.

Continuing Evolution of Facilitation and Other “Upstream” Efforts

As evidenced in the Continuum, the realm of special education has spurred innovation in dispute resolution with state education agencies gravitating toward those practices that have shown the most promise, built stronger partnerships between family members and educators, and resulted in positive educational outcomes for students with disabilities. Foremost among those has been the success of IEP and Individualized Family Service Plans facilitation programs. Once just a good idea, these programs have grown from eight state-wide programs in 2005 to approximately half the states sponsoring or supporting the development or delivery of this type of practice.

CADRE’s overarching contribution is for the full spectrum of stakeholders to build and improve effective dispute resolution practices. For the benefit of students, families, and schools alike, CADRE supports the development of earlier, less costly, and more durable decision-making and dispute resolution methods. In the end, students and their educational programs are best served when adversarial encounters are avoided and differences are resolved through positive communication and collaboration. ♦

Endnotes

1 See *Families and Schools: Resolving Disputes Through Mediation* (Consortium for Appropriate Dispute Resolution in Special Education ed., 2002) (discussing these and similar scenarios), available at <http://www.eric.ed.gov/PDFS/ED471810.pdf>.

2 David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1 DUKE L.J. 166 (1991); Edward Feinberg, Jonathan Beyer, & Philip Moses, *THE ROLE OF ATTORNEYS IN SPECIAL EDUCATION MEDIATION* (Consortium for Appropriate Dispute Resolution in Special Education ed., 2000).

3 The Education for All Handicapped Children Act of 1975 (PL 94-142); the Individuals with Disabilities Education Act (IDEA) of 1990 (PL 102-119); the Individuals with Disabilities Education Act of 1997 (PL 105-17); the Individuals with Disabilities Education Act of 2004 (PL 108-446).

4 20 U.S.C. § 1401(c)(8) (2006).

5 On parental satisfaction, see Lynn Kerbeshian, *ADR: To be or...?* 70 NORTH DAKOTA L. REV. 381 (1994); John W. Forbis, Jr., *The Perceptions of Illinois School Administrators and Parents Regarding Mediated Special Education Disputes* (January 1994) (unpublished Ph.D. dissertation, Saint Louis University) (on file with Dissertation Abstracts International). On the resolution of disputes prior to hearing, see Gloria T. Symington, *MEDIATION AS AN OPTION IN SPECIAL EDUCATION* (Project Forum & National Association of State Directors of Special Education eds., 1995),

available at <http://www.eric.ed.gov/PDFS/ED378768.pdf>. On reduced financial burden to states in managing local level disputes, see Jay G. Chambers, Jenifer J. Harr & Amynah Dhanani, WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000? SPECIAL EDUCATION EXPENDITURE PROJECT (American Institutes for Research in the Behavioral Sciences & Center for Special Education Finance eds., 2003), available at <http://www.eric.ed.gov/PDFS/ED480760.pdf>; Sam Neustadt, CADRE: Concept Paper: Alternative Dispute Resolution (2000), <http://www.directionservice.org/cadre/adrpaper.cfm>; Judy A. Schrag, MEDIATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION PROCEDURES IN SPECIAL EDUCATION (Project Forum & National Association of State Directors of Special Education eds., 1996), available at <http://www.eric.ed.gov/PDFS/ED399736.pdf>. On improved working relationships between families and educators, see Feinberg et. al., *supra* note 2; Sharon Schumack & Art Stewart, WHEN PARENTS AND EDUCATORS DO NOT AGREE: USING MEDIATION TO RESOLVE CONFLICTS ABOUT SPECIAL EDUCATION: A GUIDEBOOK FOR PARENTS (Center for Law and Education ed., 1995), available at <http://www.eric.ed.gov/PDFS/ED387990.pdf>. On improved progress of children in schools, see Ed Feinberg, Jonathan Beyer & Philip Moses, BEYOND MEDIATION: STRATEGIES FOR APPROPRIATE EARLY DISPUTE RESOLUTION IN SPECIAL EDUCATION (Consortium for Appropriate Dispute Resolution in Special Education ed., 2002); Jose L. Martin, 10 EFFECTIVE STRATEGIES TO RESOLVE SPECIAL EDUCATION DISPUTES WITHOUT DUE PROCESS (2001).

6 See Eileen M. Ahearn, STATE SPECIAL EDUCATION FORMS: QUICK TURN AROUND (QTA) (Project Forum & National Association of State Directors of Special Education eds., 2002), available at <http://www.eric.ed.gov/PDFS/ED471028.pdf>; Jay G. Chambers, et al., *supra* note 5; Richard Zeller, Aimee Taylor, Philip Moses, Anita Pierce, John Reiman & Marshall Peter, PART B SPP/APR 2007 INDICATOR ANALYSES (U.S. Office of Special Education Programs ed., 2007).

7 On relationships, see Lyn Beekman, Suggested Communication Guidelines (1999) (unpublished work); Feinberg et. al., *supra* note 2. On favoring school districts, see Jay G. Chambers, et al., *supra* note 5. On financial and emotional costs to families and schools, see Jay G. Chambers, et al., *supra* note 5; Josephine Gittler & Joicey Hurth, *Conflict Management in Early Intervention: Procedural Safeguards and Mediation*, 11 INFANTS AND YOUNG CHILDREN 15 (1998). On the impact to state and local agency budgets and services, see Jay G. Chambers, et al., *supra* note 5; Sam Neustadt, *supra* note 5; Judy A. Schrag, *supra* note 5.

8 Kelly Henderson, OPTIONAL IDEA ALTERNATIVE DISPUTE RESOLUTION, (Project Forum, National Association of State Directors of Special Education & Consortium for Appropriate Dispute Resolution in Special Education eds., 2008), available at <http://www.eric.ed.gov/PDFS/ED501695.pdf>.

9 71 Fed. Reg. 46748 (Aug. 14, 2006).

National Resource for Dispute Resolution System Integration and Performance Enhancement

CADRE delivers technical assistance and information support to Office of Special Education Programs, state education agencies, Lead Agencies (typically state health agencies), the National and Regional Parent Technical Assistance Centers, and individual federally-funded parent centers in order to:

- Assist states in adopting effective dispute resolution approaches
- Improve effective management of state dispute resolution systems
- Improve dispute resolution skills of practitioners, parents, and school and provider staff

This assistance is intended to result in:

- Improved state dispute resolution system compliance and performance
- Increased use of early dispute resolution processes
- Decreased use of expensive and adversarial dispute resolution processes

To achieve these purposes, CADRE's work is organized around a number of objectives, including:

1. Organizing and developing knowledge about effective dispute resolution systems, methods and approaches
2. Providing intensive technical assistance to selected states, including states that have been identified by OSEP, to help them successfully meet their State Performance Plan targets and improve their dispute resolution systems
3. Rendering targeted technical assistance to states and parent centers to help improve practices, to maximize effective participation in dispute prevention and resolution, and to improve technical assistance system management

- Supporting knowledge utilization through information dissemination activities that reach the broadest possible audience

As a small specialty center serving a large footprint, to include all 50 states, the District of Columbia, the territories, the Bureau of Indian Affairs, and the Department of Defense, CADRE has developed robust partnerships that leverage the resources of organizational and governmental partners, ensuring the broadest possible access to practices that are promising and supported by evaluative data. Along with its own nationally recognized staff, CADRE draws on the expertise of an outstanding group of consultants and advisors. The challenge of providing technical assistance to a large number of entities with limited staffing and resources has required CADRE to think creatively and to use technology to disseminate emerging, innovative, and effective practices.

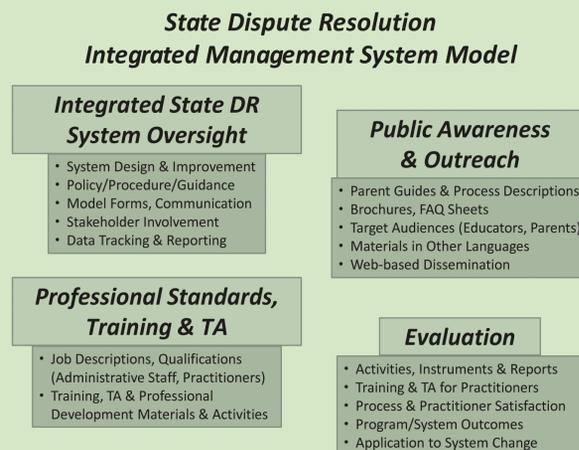
A core component of CADRE's intensive technical assistance services is its approach to dispute resolution systems integration and performance enhancement and the Management System Model that accompanies it (see Figure 2), which is used in conjunction with the CADRE Continuum. CADRE's management model is broken into four function areas:

- Oversight:** This function includes the elements of system design; relevant statutes, regulations, policies, and procedures; stakeholder involvement; and the materials and procedures used to request a particular practice, track activity, communicate with participants and practitioners, and collect data related to use and outcomes.
- Professional Standards:** This function includes the elements related to identification, selection, training, and professional development of professional staff and practitioners, which include employees of state and lead agencies, employees of the organizations with which they contract, and the neutrals providing or conducting the processes.
- Awareness & Outreach:** This function includes the elements related to materials, resources, and activities utilized by the consumers of dispute resolution processes, including general information on the available dispute resolution options in a state, both required and optional; resources intended to describe parent and student rights; guidance provided to parents or others to help

them prepare a request for any dispute resolution process; and materials for and related to preparing for and participating in any dispute resolution process.

- Evaluation:** This function includes the elements related to procedures, materials, activities, and results of dispute resolution activities including methods, feedback, and customer satisfaction forms, reports, summaries, and documents that display data or provide analyses of dispute resolution activity including patterns of use or trends, and practitioner and process evaluations; and recommendations for changes in practice drawn from the analyses, such as reports of adopted changes in practice or policy as well as documentation focusing on whether dispute resolution processes result in changes that are durable, improve parent-provider relationships, or other impacts.

Figure 2



CADRE has integrated these two models, the Continuum and the Management System Model, and has created an online, searchable repository of items related to the design, implementation, delivery, and evaluation of dispute resolution services. This Resource Showcase houses over 700 individual resources related to the entire range of dispute resolution practices, from Stage I Prevention activities through the required options found in the Procedural Safeguards, which are used throughout the various functions and elements of a high-performing dispute resolution system: www.directionservice.org/cadre/exemplar/matrix.cfm.