



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

**CEPI Education Law Newsletter**

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

JANUARY 2007: Vol. 5-5

**ALTERNATIVE DISPUTE RESOLUTION IN SPECIAL EDUCATION: 2007****Overview**

I recall as a young doctoral student at Duke University in the mid-1960's how one of my professors consistently stressed the inevitability of *human conflict*. His thesis was that given certain stimuli the natural, benign, and ever present process of human *competition* automatically converts to *conflict*; a more powerful and potentially destructive process. In his opinion, however, it was possible to harness *conflict* and use it in a positive way. To successfully gain control over *conflict* he advised that the parties involved must (1) recognize it as soon as it appears, (2) admit that it exists and not treat it with deliberate indifference, (3) seek out [identify] its true source(s), (4) work to defuse its potentially explosive character, (5) identify viable alternatives and options available to effectively deal with it, and (6) select the least burdensome alternative to reach resolution [settlement] of the core dispute. Little did I realize forty-years ago that my professor's thesis and advice would prove so important to me over the years in my work as a certified special education mediator.

**Dispute Resolution in Special Education**

When conflicts between individuals spring to life, numerous options are available to the parties to "work it out" and achieve a mutually acceptable settlement of the matter. In the majority of situations disputants can immediately and informally settle the matter by simply talking it out. Still others might need the help of a neutral third party intervener to facilitate a resolution of the problem. Others, however, might need to resort to litigation (i.e., go to court) and have a judge decide the case and issue an order formally resolving the dispute. Vacca and Boshier (2003)

*The Courts and Special Education Litigation.* Beginning with such pre-Education for All Handicapped Children Act (1975) (now IDEA 2004) cases as P.A.R.C. v Commonwealth (E.D. Pa. 1972) and Mills v Board of Education (D.D.C. 1972), and down through such landmark Supreme Court decisions as Board of Education v Rowley (1982), Irving I.S.D. v Tatro (1984), Honig v Doe (1988), and Shaffer v Weast (2005), federal and state courts functioned as the places of choice for settling conflicts involving parents and public school systems. As such, over the past three-plus decades litigation (court action) was the most popular dispute resolution process as judges were routinely called upon (some would argue overburdened) to interpret that which seems so simple;

i.e., statutory language mandating that all eligible children with educational disabilities receive a free and appropriate education (including necessary related services) in the least restrictive environment.

*Alternative Dispute Resolution Emerges.* In 2007, of all the areas of contemporary public education law where the potential for conflicts between parents, citizen groups, and school officials exists, special education remains at the top of the list. However, the explosion of special education litigation that took place in the 1970's, 1980's, and 1990's is subsiding. In my opinion, based upon my more than ten years of professional practice, the era of relying on litigation and court action to settle a majority of special education conflicts is rapidly coming to a close. While some special education situations will ripen into court action, alternative means of dispute resolution (e.g., settlement conferences, resolution sessions, arbitration, traditional negotiation, mediation) are proving successful in settling most disputes, negating the need to take every matter into a court of law.

As legal experts point out, “[b]ecause they have become dissatisfied with lawsuits (as well as with hearings), parties to special education disputes have begun to consider alternative dispute resolution techniques, especially mediation.” Goldberg (2005) Other experts point out that in the early 1990's mediation emerged “as the process most frequently recommended to address problems associated with due process hearings.” Feinberg, et al. (2002) As research shows, “in many states a clear trend is emerging of parents and school districts using mediation as a preferred alternative to due process hearings for resolving special education disputes.” Feinberg, et al. (2002) In 2007 many of this nation's law schools now include courses in mediation and have organized alternative dispute resolution centers.

### **Mediation in Special Education Disputes**

The purpose of this commentary is to focus on *mediation* as a preferred alternative to due process hearings and litigation for achieving early resolution of special education-related conflicts between parents and public school officials. Implications and suggestions for local school board policy also will be offered.

*Mediation: What Is It?* Sometimes referred to as “assisted negotiation,” *mediation* is a process that involves an impartial, neutral third party in assisting disputing parties reach a mutually agreeable resolution (settlement) of their differences. BLACK'S LAW DICTIONARY (1999) Some experts define mediation as “negotiation facilitated by a neutral person.” Goldberg (2005)

A voluntary, informal, and confidential process, *mediation* “differs from arbitration in that the mediator makes no decision and imposes no duty on any party, and any party and the mediator can freely and unilaterally terminate the process.” Bryson (1989) The mediator functions as a facilitator in the process and not as a decision-maker. As one resource states, the mediator “helps the participants reach their own mutually agreeable solution.” CADRE (2002) While the mediator can (1) assist the parties to identify options and steps to take in resolving their differences, and (2) contribute relevant legal information to clarify points of contention, he/she can not give legal advice to the parties. And, most important, all decisions made in mediation sessions are those of the parties.

Because written mediation agreements are enforceable in any state court of competent jurisdiction or in a federal district court, it would be prudent for the parties to have the document reviewed by legal counsel prior to signing. Bryson (1989)

*Mediation Grows in Importance.* For more than a decade the *mediation process* has served as a popular, frequently relied on, and effective means to early resolution of special education disputes between parents and

local public school systems. As one source reports, “[b]y 1994, 39 of the 50 states had adopted special education mediation systems....Mediation has been a required component of the dispute resolution process since the reauthorization of IDEA 1997....” Feinberg, *et al.* (2002) I am proud to report that the Commonwealth of Virginia, where I serve as a certified mediator in the Statewide Special Education Mediation System (SSEMS), was one of the earliest to offer mediation services to parents and local public school systems, and to train and certify a cadre of certified special education mediators.

### **Policy Implications**

This past November (2006), I was honored to have a brief article on mediation published by the National School Boards Association (NSBA). Appearing in a special publication for NSBA affiliate members, *Leadership Insider: Practical Perspectives on School Law and Policy*, my piece was entitled *The school board role in promoting early resolution of special education disputes*. A complete version of the article can be found at [www.nsba.org/na](http://www.nsba.org/na) The intent of the article was threefold: (1) to encourage local public school boards to seek an early resolution to special education disputes, rather than dragging out the matter through time consuming and costly litigation; (2) to emphasize how the board’s policy direction significantly influences the potential for reaching mutual resolution of special education disputes; and, (3) to make suggestions for formulation of school system policy. What follow are examples of suggestions for policy made in the NSBA article.

As a matter of policy it must be clear that:

- The school board (the Board) intends to follow and implement all mandates and procedures contained in special education law (federal and state).
- The Board maintains open and constant communication with all parents, especially parents of students covered by special education law (federal and state).
- Parents of students covered by special education law (federal and state) receive timely notices required by law, especially their right to seek early dispute resolution options.
- The school system’s director of special education and all school administrators have discretion to immediately handle all disputes with parents.
- The school system’s director of special education, school administrators, and school staff are encouraged to seek creative, research based methodological and curricular options available and appropriate to meet the needs of special education students.
- The Board is willing, through such alternative options as informal resolution sessions and mediation, to seek early resolution of all special education disputes with parents.

Last year I had the opportunity to attend a negotiation training offered by the Program on Negotiation at the Harvard Law School. The instructor was the celebrated author and noted consultant William Ury. Because mediation actually involves elements of both bargaining and negotiation (which Ury defines as “back and forth communication trying to reach an agreement”), I have found the following thoughts helpful as I mediate disputes: “A basic fact about negotiation...is that you are dealing not with abstract representatives...but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints; and they are unpredictable.” Fisher and Ury (1991) As professor Ury opines, “[a] working relationship where trust, understanding, respect, and friendship are built up over time make new negotiations smoother and more efficient.” Ury (1993)

### **Resources Cited**

- Bryson, Hamilton, HANDBOOK ON VIRGINIA CIVIL PROCEDURE, Second Edition (Michie Co. 1989)
- CADRE, FAMILIES AND SCHOOLS: RESOLVING DISPUTES THROUGH MEDIATION (CADRE 2002)
- Education for All Handicapped Children Act, 20 U.S.C. 1401, *et seq.* (1976)
- Feinberg, Edward, et al., BEYOND MEDIATION: STRATEGIES FOR APPROPRIATE EARLY DISPUTE RESOLUTION IN SPECIAL EDUCATION (CADRE 2002)
- Fisher, Roger and Ury, William, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, Second Edition (Penguin Books 1991)
- Goldberg, Steven, *Alternative Dispute Resolution Techniques*. In Kenneth Lane, et al., Editors, THE PRINCIPALS LEGAL HANDBOOK, Third Edition (ELA 2005)
- Garner, Bryon A., Editor in Chief, BLACK'S LAW DICTIONARY, Seventh Edition (West Group 1999)
- Hendrick Hudson School District v Rowley, 458 U.S. 176 (1982)
- Honig v Doe, 108 S.Ct. 592 (1988)
- Individuals with Disabilities Education Act, 20 U.S.C. 1401, *et seq.* (2004)
- Irving I.S.D. v Tatro, 468 U.S. 883 (1984)
- Mills v Board of Education, 348 F.Supp.866 (D.D.C. 1972)
- P.A.R.C. v Commonwealth, 343 F.Supp.279 (E.D. Pa. 1972)
- Shaffer v Weast, 546 U.S. \_\_\_ (2005)
- Ury, William, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (Bantam Books 1993)
- Vacca, Richard S., *The School Board Role in Promoting Early Resolution of Special Education Disputes*. In Leadership Insider: Practical Perspectives on School Law and Policy (NSBA 2006)
- Vacca, Richard S. and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Sixth Edition (LexisNexis 2003), and 2006 CASE LAW SUPPLEMENT

*Richard S. Vacca*  
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.