MAKING SENSE OF DISPUTE RESOLUTION OPTIONS AFTER IDEA 2004

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I. INTRODUCTION.

A. Congress in IDEA 2004 created the "resolution meeting" (previously referred to as the "resolution session") and tinkered as well with other IDEA processes. However, it did so somewhat inartfully raising many questions. The recently promulgated regulations, and the Office of Special Education Program's (OSEP's) accompanying discussion, clarifies some things and raises other interesting points.

B. In this session we will take a look at the various ADR options under IDEA 2004 and its regs, potential problems in their use, and how they might be sensibly implemented.

II. MEDIATION.

A. The new regs and OSEP's "discussion" concerning them reveal:

1. In response to commentators who stated that the Congressional intent in the Senate Report was for a hearing officer to have the same plenary power over a hearing as a federal or state judge, and therefore recommending that a hearing officer be able to require mediation, OSEP said since IDEA requires mediation to be voluntary, a hearing officer cannot order parties to engage in mediation (p. 46694).

2. OSEP stated there is nothing in IDEA that would prohibit the parties from agreeing to have a mediator facilitate an IEPT meeting and put that in a mediation agreement (p. 46695).

3. OSEP rejected requiring that a list of mediators and their qualifications be provided publicly by an SEA, but said it could do so if it wanted (p. 46695).

4. With regard to Section 506(b)(3)(ii) requiring an SEA to select mediators on a random, rotational, or other impartial basis (and the deletion of the words that if such is not done the parties must agree on the mediator), OSEP clarified that permitting the parties to agree on a mediator would constitute an impartial basis (p. 46695).

5. The words "arising from that dispute" have been removed from 300.506(b)(6)(i) and 506(b)(8) so that confidentiality applies to any hearings or federal or state court proceedings under IDEA. OSEP noted that this is to address the concern of some commenters that mediation was being used as "discovery" for some possible future dispute between the parties, simultaneous disputes between the LEA and other children, or disputes involving the same lawyers but different parties (p. 46695).

6. The requirement that parties sign a confidentiality pledge prior to the start of the mediation has been removed since the law requires confidentiality. But, SEAs can still allow parties to sign them (p. 46696).

7. As to whether a mediator could also simultaneously serve as a hearing officer, OSEP stated a conflict would arise if a mediator was assigned as a hearing officer in the same matter (p. 46696). OSEP did not address whether the conflict could be disclosed, addressed, and waived by the parties.

8. OSEP also notes that an LEA cannot use Part B funds to support the mandated mediation process to be funded by the SEA, but can use such funds to support an alternative mediation process it offers, provided parents have the option of using the mandated SEA process (p. 46624).

III. STATE ADMINISTRATIVE COMPLAINTS.

A. The new regs and OSEP's "discussion" concerning them reveal:

1. To make clear that SEAs have broad flexibility to determine the appropriate remedy or corrective action, "compensatory services or monetary reimbursement" were added as examples of corrective action (300.151(b)(1)). OSEP noted that absent making this clear, parents might choose to use more costly and time consuming hearings (p. 46602).

2. Not wanting to require SEAs to offer "alternative means of dispute resolution" and mediation as part of the minimum complaint procedures, such was removed from 300.152(a)(3). Noting that the term refers to other procedures/processes that SEAs have found to be effective in resolving disputes quickly and effectively (other than those IDEA requires), OSEP still encourages SEAs to use such other alternative means, if available in the state.

OSEP did not define what it means by "alternative means of dispute resolution" except the means should have been found to be effective and not required under IDEA (p. 46604).

3. OSEP also noted it was not going to place the burden on SEAs of offering to non-parents mediation or other alternative dispute resolution mechanisms, but encouraged SEAs to do so (p. 46604).

4. Stating that parties need only agree to engage in mediation, and accordingly it was not necessary to obtain parental written consent to do so, the process being voluntary, the words "with the consent of the parent" were deleted from 300.152(a)(3)(ii).

5. OSEP notes that merely agreement, not "consent," is required to extend the 60-day time limit (p. 46604). 300.152(d)(1)(ii) was revised to allow the 60-day time limit to also be extended if the parties agree to engage in other alternative means of dispute resolution available in the state. Finally, OSEP noted that at any time either party withdraws from the mediation (or other alternative means of dispute resolution) or withdraws from the agreement to the extension of the time limit, the extension would end (p. 46604).

6. An SEA is now allowed, but not required, to permit parties to a mediation or resolution agreement to seek enforcement of them and decisions at the SEA level through a state mechanism/procedure, such as complaint procedures, as long as the parents' right to seek enforcement in court is neither denied nor delayed (300.537) (pp. 46604-46605).

7. The provision requiring an SEA to resolve a complaint alleging that an LEA failed to implement a due process hearing decision was restored (300.152(c)(3)).

8. The language requiring issues in a complaint, that are not a part of a due process complaint, to be resolved (as opposed to being held in abeyance until the due process complaint was resolved) was restored (300.152(c)(1)).

9. In discussing how an SEA should handle a complaint that is withdrawn, OSEP stated that if the parties reach agreement to resolve a complaint through mediation, it is not subject to the SEA's approval. Once resolved or withdrawn, it states no further action is required by the SEA (p. 46605). Query, whether this comment is consistent with an SEA's responsibility under 300.151(b)(2) where in resolving a complaint if it is found there was a failure to provide appropriate services, it must address the "appropriate future provision of services for all children with disabilities."

10. With regard to the differences between the two year statute of limitations for hearings (unless state law provides otherwise) and the one year for complaints, OSEP merely said that SEAs could take complaints beyond the one year timeline if they chose. And, as for issues in a state complaint, some of which are also part of a hearing, the one year statute of limitations applies to the issues under the state complaint procedures and the two year applies to those under the hearing (with the words "except for complaints covered under hearings" being removed from 300.153(c) to clarify this point) (p. 46606).

11. Each SEA must develop a model form to assist parents in filing a complaint. But neither the SEA nor an LEA can require parents to use the model form (300.509).

12. With regard to a party appealing an SEA complaint finding, OSEP stated it is up to SEAs whether to establish a procedure for such to be reconsidered or appealed (consistent with IDEA requirements, most notably the 60 calendar day timeline for finality purposes). But, it said after the SEA's final decision is issued, a parent or LEA has the right to request a due process hearing, may do so provided the issue is hearable and within the two year statute of limitations (or state law limitation) (p. 46607).

13. OSEP reiterated its longstanding position that an SEA must resolve any complaint in its jurisdiction, and may not decline to do so simply because the issue could also be the subject of a due process hearing (p. 46694).

14. OSEP states that complaint procedures can be used to resolve matters concerning the identification, evaluation, placement, or FAPE of a child. It stresses that an SEA in resolving a complaint should not only determine whether the LEA has followed the required procedures to reach determination, but also whether the decision is consistent with IDEA requirements in light of the child's individual situation, including if necessary reviewing the evaluation data and why the LEA made the determination (p. 46601). These comments would appear to indicate a change in OSEP's prior position that the complaint process could only determine whether IDEA's procedural requirements had been met or not, with any review of a determination on eligibility or the appropriateness of an IEP needing to be made through the hearing process.

B. In Michigan, either as an outgrowth of mediation or settlement discussions in conjunction with a pending hearing, parties are often arbitrating current, or even future, complaints. But, even though very effective for many years, this means or option has not been encouraged or in any way sanctioned by the SEA.

IV. RESOLUTION MEETING PROCESS.

A. The new regs and OSEP's "discussion" concerning them reveal:

1. The term "session" has now been replaced with the word "meeting" in reference to this process.

2. OSEP clarifies that there is no provision requiring a resolution meeting when an LEA is the party requesting a hearing (p. 46700).

3. 300.510(b)(1) is changed to read that if an LEA has not resolved a hearing complaint within 30 days of its receipt, the hearing "may" occur rather than "must" occur since the parties might agree on an extension of the resolution period or reach agreement after the period has expired (p. 46701).

4. A new reg, 300.510(b)(3), has been added to provide that except for where the parties have agreed to waive the resolution process or use mediation, a parent's failure to

participate in the meeting will delay the timelines for both the resolution process and hearing until the meeting is held.

Where the parent fails to participate in the meeting, the LEA would need to continue its efforts throughout the 30 day period, and if at the end it is still unable to convince the parent to participate, it should seek the intervention of the hearing officer to dismiss the hearing complaint. A new reg at 300.510(b)(4) and (5) so provides (p. 46702). LEAs are also now required to document their attempts to ensure parent participation in the meetings in the same manner as IEPT meetings (300.510(b)(4).

5. OSEP states that if an LEA fails to meet its obligation to convene a meeting within 15 days, schedules meetings at times/places that are inconvenient for the parent, or otherwise does not participate in good faith, the parent should be able to request a hearing officer to allow the hearing to proceed.

6. OSEP says it is not necessary to require a parent to give an LEA notice that it intends to bring an attorney to a resolution meeting because it would not be in the interest of the parent to withhold such information. In such cases it notes the LEA could refuse to hold the resolution meeting until it arranges for its attorney to be present (within the 15 day period) and the parent would incur additional expenses by having to bring their attorney to two meetings (p. 46701).

7. In refusing to offer guidance on a protocol or structure for the meeting, including whether a mediator/facilitator should conduct it, OSEP states it would not, as doing so could interfere with the LEA and parent in their efforts to resolve the complaint in the meeting (p. 46701).

8. A new reg, 300.510, has been added specifying that the 45-day timeline for the hearing starts the day after one of the following events: a) both parties agree in writing to waive the resolution meeting; b) after either the mediation or resolution meeting starts, but before the end of the 30-day resolution period, both parties agree in writing that no agreement is possible; and c) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later a party withdraws from the mediation process.

9. OSEP states that unless the agreement specifically requires the IEPT team to reconvene, nothing in the Act or regs would require it where the agreement includes IEP related matters. It states the agreement may supersede an existing IEP (p. 46703).

10. A new reg, 300.537, provides that a state may provide parties to mediation or resolution agreements other mechanisms to enforce that agreement (e.g., state complaint process), provided the mechanisms are not mandatory and do not deny/delay the right of the parties to seek enforcement of the agreement in court.

11. OSEP refused to provide that discussions during resolution meetings remain confidential since the Act is silent in this regard. It said parties could agree to such in

their resolution agreement but that an SEA could not require such or make it a condition to the parent's participation (p. 46704).

B. It would appear that this process is having greatest success in larger districts where the "problems" had previously been addressed primarily at the building level, with the resolution meeting process offering the first opportunity for central administration to address the "problems." In smaller districts where such has not been the case, the resolution process appears to have had less success.

Experience has also shown that the likelihood of success is increased if the parties discuss and agree on various aspects of the process (e.g., whether to utilize a facilitator or mediator, the involvement of attorneys, and if so how, if at all, who should attend, and confidentiality). (See in these regards the "Agreement on Dispute Resolution Process" attached).

C. Questions regarding the involvement of attorneys have already prompted litigation. In Melrose Pub Sch, 46 IDELR 119 (SEA MA 2006), a hearing officer ruled that a special education administrator, who also happened to be an attorney, could attend a resolution meeting. The person had been on the student's IEP team, was not representing the district in the hearing, and had not practiced law for years. The hearing officer noted that excluding an administrator who happened to be an attorney under these circumstances would probably also mean excluding the parent who happened to be an attorney.

In addition, in our state where a parent did not bring an attorney to a resolution meeting, a district had its attorney in an adjoining room. After agreement was reached in the resolution meeting, the district had the parent wait and, without telling the parent, had the attorney draft the agreement. The parent found out and filed a complaint, which was found to be valid. The basis was that, among other things, it was found the involvement of the district's attorney affected the outcome of the resolution meeting, created an advantage for the district over the parent, and resulted in a change of the language of the agreement. Further, it found that IDEA 2004 envisioned equal representation and access to a lawyer regarding the resolution meeting process.

The district appealed and in Mr. & Mrs. S. et al v Rochester Community Sch, __ IDELR __ (USDC MI 2006), the court, after a lengthy examination of the wording of the statute and legislative history, drew a distinction between the preliminary meeting part of the resolution meeting (which ends when the parties reach agreement or conclude they cannot reach agreement) and the drafting of an agreement when one is reached. It concluded that when the parent has no attorney, the district's attorney cannot be physically present, nor its functional equivalent (e.g., listening to the meeting by phone or where district representatives periodically leave the preliminary meeting to confer with their attorney). After the preliminary meeting has ended, it finds there is no limitation on the involvement of attorneys, including the potential for the parent's recovering attorney's fees for such activities, such as drafting or reviewing the agreement. With regard to the involvement of the district's attorney, the court noted it should be limited to converting the substantive agreement into a legally enforceable agreement where the attorney was not permitted to attend the preliminary meeting because the parent was not accompanied by counsel.

The parent also filed a grievance with the State Bar of Michigan which was dismissed.

III. FACILITATION.

While mentioned at times by OSEP in its discussion relating to various regulations, the role or process is not expressly mentioned in the new regs. While most would generally define facilitation as a neutral person guiding, not running, the meeting process (e.g., helping with the flow of discussion, encouraging full participation, keeping the participants on task, etc.), be careful. The term is being used in a variety of ways across the country (e.g., a non-neutral actually running the meeting and certainly not mutually agreed upon to serve in that capacity).

IV. ARBITRATION.

A. While a form of arbitration was the subject of much discussion during the development of IDEA 2004, it is not mentioned in the Act anywhere except in a series of items to be monitored by SEAs (Section 616(a)(3)(B)), which most believe this was an oversight.

B. Parents and districts in Michigan (and a few other places across the country) have used arbitration to resolve disputes for years, notwithstanding OSEP's apparent disfavor of the process. See in this regard "ADR: Got a Big Dispute/Mess? Hoping There Is an Option Other Than Hearing, Mediation, or Total Capitulation? There Is!," which is attached, together with a sample agreement.

V. SORTING OUT THE PROCESSES AND AGREEING ON WHICH PROCESS(ES) WILL BE USED AND HOW.

A. As discussed above, the array of options now available under IDEA and otherwise has caused confusion among not only parents but sometimes districts as well. Often the parties will consider and agree to blend the processes, such as utilizing a facilitator or mediator in a resolution meeting.

B. While not always possible, it is best if the parents and districts (with or without advocacy/attorney assistance) discuss the various options and agree upon how they will proceed. Depending on the situation, a district representative, advocate/attorney for either party, facilitator, mediator, hearing officer, or complaint investigator might prompt such a discussion. Best practice would have that discussion result in a written agreement on the dispute resolution process the parties will use and the logistical details. See in this regard the attached "Agreement on Dispute Resolution Process" which might be used as a model, subject to being revised to meet any state requirements or those presented by a particular situation.

VI. ENFORCEABILITY OF AGREEMENTS.

A. The regs restate IDEA 2004's provisions to the effect that both a mediation agreement, as well as a resolution meeting agreement, are enforceable in any state court of

competent jurisdiction or a federal district court (300.506(b)(7) and 300.510(d)(2)). A new reg (300.537) provides that either of these types of agreements may also be enforced by "using other mechanisms" provided such are not mandatory and do not delay or deny a party the right to seek enforcement of the agreement in court.

As discussed above, clearly a state administrative complaint would be an option the SEA could make available as a mechanism to enforce such agreements. It remains to be seen what other mechanisms will be made available, if any (e.g., arbitration (see below)).

B. A question arises as to whether mediation, resolution meeting, or other settlement agreements are enforceable by a hearing officer given the language in IDEA 2004 and the regs that they are enforceable in court. Prior to IDEA 2004, approximately a dozen decisions had been rendered by various state and federal courts with the vast majority ruling that hearing officers had such jurisdiction on a variety of grounds, including that the agreement related to the student's IEP or other matters which were hearable or that administrative remedies must be exhausted.

The only published decision specifically addressing this question is Norwood Pub Sch, 44 IDELR 104 (SEA MA 2005). Insofar as here pertinent, the parents alleged that the district had violated a voluntary settlement agreement. The question then arose as to whether the hearing officer had jurisdiction to consider and enforce it. Noting the 1st Circuit has stated the jurisdiction granted to an IDEA hearing officer should be understood as "broad" in scope concerning "any matter relating to" the identification, evaluation, placement, or FAPE of a child, he said he was unaware of any federal appeals court that had considered the question. But, all federal district courts had found such jurisdiction existed provided the subject of the agreement fell within any of the four items noted above. But, these decisions preceded IDEA 04. In an extended discussion he finds that the IDEA 04 amendments did not change the hearing officer's jurisdiction in this regard. Among the reasons, he noted was that Congress is presumed to have understood and continue in effect the judicially interpreted meaning of IDEA when it amended the statute, the amendments were intended to provide greater, not fewer, opportunities for informal and administrative resolution of disputes, and various policy implications with regard to timeliness of resolution and the advantage of creating an administrative record. Finally, he notes that the 2004 amendment that mediation or resolution session agreements are enforceable in state or federal courts, he does not find implicitly indicates Congress's intent to not extend a hearing officer's jurisdiction of settlement agreements given it appears from the legislative history that Congress did not consider such. As for hearing officers being reluctant to address settlement agreements since it would require the understanding of applied principles of contract law (not typically within their expertise), while understanding such, the hearing officer did not find it a persuasive reason since hearing officers routinely take jurisdiction over IEPs (including enforcement) which are a form of an agreement.

While the decision in Norwood is well reasoned and worthy of consideration, there is certainly room for a contrary result.

In one other decision, Linda P. v State of Hawaii Dept of Ed, 46 IDELR 73 (USDC HI 2006), a parent entered into the settlement agreement regarding the issues in a hearing

and then tried to request another hearing on one of the settled issues. The hearing officer dismissed the hearing based on the settlement agreement. The parent appealed and the court upheld the decision of the hearing officer below. It then noted in response to the parent's contention that the hearing officer below did not have jurisdiction (given the language of IDEA 2004 regarding a party can go to court to enforce an agreement), that even if the parent was right in this regard, the court would enforce the agreement and dismiss her hearing request.

C. Another mechanism as noted above (whether the SEA makes it available or not) would be for the settlement agreement to include an arbitration clause. In addition, the agreement should address whether an arbitration award was enforceable in court and that other traditional IDEA options (e.g., requesting a hearing or filing a state complaint) were being waived. See again in this regard "ADR: Got a Big Dispute/Mess?" and the attached sample agreement.

AGREEMENT ON DISPUTE RESOLUTION PROCESS

_____ ("Parents"), on behalf of their son/daughter _____ ("Student"), and the _____ School District ("District"), have a dispute under the Individuals with Disabilities Education Act (IDEA) which they agree to address utilizing the following process:

[Both parties will initial the agreed upon option, considering, among other things, whether they desire the involvement of their attorney, confidentiality, and the three business day revocation period applicable to resolution session agreements, all of which are addressed in the provisions below.]

____ ____ 1. We will participate in a resolution meeting as provided under the Individuals with Disabilities Education Act (IDEA). However, in doing so we agree to utilize the services of a mutually agreed upon facilitator[1] and the terms of this Agreement set forth below.

____ ____ 1A. We will participate in a resolution meeting as provided under the Individuals with Disabilities Education Act (IDEA). However, in doing so we agree to utilize the services of a mutually agreed upon mediator[2] and the terms of this Agreement set forth below.

____ ____ 1B. We waive our right to participate in a resolution meeting as provided under the Individuals with Disabilities Education Act (IDEA). Instead, we agree to participate in a mediation session with a mutually agreed upon mediator.

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[1] As here used, the term "facilitator" means a neutral, trained person who would not "run" or "chair" the meeting. Rather, the facilitator would guide the process when necessary by encouraging participation, keeping the participants on task, ensuring understanding, and helping keep the discussion flowing, mutual, and respectful, with the goal of obtaining a resolution.

[2] As used here, the term "mediator" means a neutral, trained person who generally, with the assistance of the parties, establishes a process, through which issues are identified and ways of resolving them explored, with a goal of reaching an agreement.

____ ____ 1C. We waive our right to participate in a resolution session as provided under the Individuals with Disabilities Education Act (IDEA). Further, we choose not to participate in mediation. Rather, we choose to proceed to hearing. ***[Cross out paragraphs 3 through 6 and next consider paragraphs 2 and 7.]***

2. We agree that while we pursue the option we have chosen above, the student who is the subject of this matter shall "stay put" i.e., remain in her/his current placement which is the student's individualized education program (IEP) dated _____, 200__, with the following modifications: _____ .

3. We agree that the facilitator/mediator *(circle one)* shall be _____.

4. The meeting shall be held at _____ a.m./p.m. *(circle one)* on _____, 2006, at the _____ Building. It is agreed that the following persons are the relevant members of the IEP team and other persons who will attend the session (including a representative of the District who can bind it):

_____

_____

_____

_____

_____

_____

_____

_____

_____

It is agreed that the attorneys representing the parties will attend the meeting. [OR] It is agreed that the attorneys representing the parties will not attend the meeting (but a party may consult with their attorney by telephone at any time).

5. The discussions that occur during this dispute resolution process shall be confidential (i.e., they may not be used as evidence in any subsequent due process hearing or civil proceeding under IDEA).

6. Any agreement reached between the parties as a result of this process shall be enforceable in a court of competent jurisdiction or as otherwise provided in the Agreement.

7. The parties agree that the thirty (30) calendar day resolution meeting period (or fifteen (15) calendar days in the case of an expedited hearing) expires on _____, 2006 (at which time the timelines for the holding of the hearing and the rendering of a decision shall commence)[3] unless parties agree in writing: a) before then that no agreement is possible; or, b) to continue mediation at the end of this 30-day period, but later a party withdraws from the mediation process.

Dated: _____ _____
Parent

Dated: _____ _____
Parent

Dated: _____ _____
District Representative[4]

C:Outlines/Form Agreement on Dispute Resolution Process
October 2006

[3] If the parties have agreed to participate in a resolution meeting, they should consider with regard to when these timelines start the three business day period after the resolution meeting during which each party may void an agreement.

[4] The District Representative signing this Agreement is representing that he/she has the authority to bind the District.

ADR: GOT A BIG DISPUTE/MESS? HOPING THERE IS AN OPTION OTHER THAN HEARING, MEDIATION, OR TOTAL CAPITULATION? THERE IS!

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I. INTRODUCTION.

A. The Education for the Handicapped Act (EHA) in 1975 established rather simple IEP and hearing processes. In the years since, IDEA has evolved with numerous detailed prescriptive requirements for the IEP process, while hearings have turned into "mini Perry Mason" trials. Plus, the U.S. Supreme Court's decision in Rowley placed critical importance on IEPs being procedurally developed in accordance with IDEA requirements.

B. A significant result of this history has been too many parents becoming "obsessed" with their rights and too many districts becoming "obsessed" with their obligations—to the point where too often both lose sight that the ultimate goal is a plan to educate the child—and that to implement it effectively requires a working relationship between parent and district.

C. To make matters worse, for many parents the right to go to hearing is from a practical standpoint worth little (save "extortion" value), given their perception of hearing officer, cost of attorney and experts, and time to complete. On the other hand, districts abhor "caving in" or spending the money on a hearing which can never provide them with a "win" (from a practical standpoint) and usually will not address the parent/district relationship or perceived problems relating to parental irresponsibility/unreasonableness.

D. OSEP (and some state DOEs) talks about encouraging dispute resolution but acts to the contrary (e.g., hearings must be done in 45 days and complaints in 60 days). Time is but a small component of what constitutes a good dispute resolution in the special ed context. Obtaining, or having a process to obtain, a good IEP for the child and a good working relationship are the critical components.

E. IDEA, with OSEP's help, has created a "pigeonhole" mentality regarding ADR under IDEA in several ways. First, all participants typically consider ADR at only one point in

time in the evaluation/reevaluation—IEPT meeting—hearing processes (i.e., at the end of the IEPT meeting). ADR options should be considered at any time a dispute arises during any of these processes.

Second, OSEP's administration of IDEA has lead to inflexibility in the implementation of the mediation process by promotion of only "traditional" mediation (e.g., "process" is the key and "self determination" at the mediation process is the goal). If any "process" is not working, then lets find a new process that will—preferably one developed by the parties themselves!

OSEP's view that no party can waive any IDEA rights discourages flexibility to combine options (e.g., mediation/arbitration or mediation/hearing), and flexibility to develop new options in lieu of IEPT meetings/complaints/hearings/mediations such as agreed upon third party processes including possibly arbitration.

F. Too many advocates and attorneys are mentally or financially "invested" in the traditional options (i.e., court, hearings, mediation, and complaints) due to lack of creativity, lack of knowledge/understanding of the practical implications of the hearing process and other ADR options, unwillingness to take risks as an advocate, monetary incentives, failure to fully advise their clients regarding ADR options (including the risks/benefits of each) and in effect steering or actually making the decision for the client to go to hearing.

Some parent advocacy organizations and law firms have their own "agenda" regarding establishing "precedent," "winning," and marketing their advocacy services—any of which might adversely affect the advocate/attorney's assessment, explanation, or advice to the client regarding ADR options and going to hearing. Parents and districts fall into the problem by wrongly asking their attorney, "what should I do?," rather than, "what are my options and the pros and cons of each?"

G. Assume for the sake of discussion that my description of the current environment surrounding disputes in special education is somewhat fair and accurate, let's take a practical realistic look at the types of disputes which commonly confront us.

II. DISPUTES—TYPES, ARRAY, AND TIMING.

A. Generally, the three most common types of disputes in special education are in regard to evaluations, the content of an IEP, and the failure to properly implement an IEP. And, of course, other disputes arise regarding a multitude of issues, ranging from alleged violations of various laws or rules to staffing assignments to transportation—the list is never-ending.

B. Not all disputes stem from the action/inaction of district staff. Some relate to parent action/inaction (e.g., failing to implement a behavior support plan (BSP) outside school, issues relating to medications, provision of information to staff from outside professionals, attendance, or the utilization of planners or logs).

C. Too often the real "problem" isn't the issue being disputed as much as the broken relationship between the parent and district staff. Due to the lack of trust, the parties cannot agree on an IEP or even if they could, the parent doesn't think it will be implemented.

D. Other examples of common yet difficult dispute situations are:

1. The LD/ADHD child requiring several accommodations, possibly a BSP, with possible perceptual/attitudinal problems on the part of certain general education staff and/or the parent.

2. A battle over methodology (e.g., Lovaas versus TEACCH, oral versus total versus ASL versus cued speech, facilitated communication, Orton-Gillingham versus any other multisensory approach, etc.).

3. More is better (e.g., extended school year, Orton-Gillingham tutoring, OT/PT, etc.).

4. Reliance upon bad professional advice (e.g., a physician regarding level of OT/PT or the necessity of a nurse, an educational "expert," a non-special education attorney, etc.).

E. Remember, these disputes can come up anytime—during the evaluation/reevaluation process, prior to or during an IEPT meeting, or while an IEP is being implemented. Thus, the parties may need to consider their ADR options at any time. Let's quickly look at the current options.

III. CURRENT OPTIONS.

A. If parents and districts could make up an "ideal" process to resolve their disputes, from my experiences I believe they could quickly agree that they would want a process **that is fair, quick, and cheap!** Look at the current processes in this light, together with the types of disputes which each option can handle.

B. **Complaint**. Whether it is fair depends on the party's perception of the state department of education. It is relatively quick given the 60-day deadline, as well as cheap given the complainant, typically a parent, doesn't need to hire a lawyer. It's best in dealing with alleged violations of law or an IEP, not whether a student is eligible or an IEP is appropriate and certainly not the "real" problems that underlie many of the more difficult dispute scenarios.

C. **Hearings**. The fairness will depend on the extent the parties have in the selection process of the hearing officer and their perception as to what they think the hearing officer knows about special education, and often the particular disability area involved. Despite the 45-day deadline, it's not typically quick, usually taking several months. And, it's not cheap for either party, particularly where the parent hires a lawyer, expert, etc. It can, for better or worse, handle just about any type of dispute but the "real" problem situations are very difficult to address, if at all, in a hearing.

D. **Mediation**. Probably perceived by the parties as the most fair, and it is certainly quick and usually cheap. Without question, its success rate is high with regard to many of the common types of disputes. But, again, with regard to the "real" problems underlying many dispute situations, while there can be a start in addressing them in mediation, it's not realistic to look for resolution in one session or even a couple.

E. **New Option The Parties Develop.** I suggest that parties start creating their own dispute resolution process, often with the assistance of their advocate/attorney, and that of a facilitator, mediator, or hearing officer, depending upon when the dispute is recognized or identified and a situation to address it is presented. Regardless of who is involved in addition to the parties, lets look at the fundamental steps that need to be addressed.

IV. STEPS THE PARTIES SHOULD FOLLOW.

Note: The parties can take these steps and create this process at any time by just talking between themselves, as an outgrowth of the IEP process, as a product of mediation, or as part of settlement of a complaint or request for hearing. Most often it is the product of a mediation.

A. **Identify what disputes the parties want to address**.

1. What are the current disputes between the parties? For example—

- ▶ Is an evaluation/reevaluation necessary and, if so, who should do it?
- ▶ Is conducting/revising a functional behavioral assessment and/or developing/revising a behavior support plan (BSP) necessary?
- ▶ Are certain goals/programs/services/accommodations appropriate to be in the individualized education program (IEP)?
- ▶ Did the district violate the IEP/BSP (or the parents violate their responsibilities concerning attendance, providing medications, implementing the BSP at home, or planner/log)?
- ▶ Did the district violate the law?
- ▶ Should the parent be reimbursed for an independent evaluation, private tutoring, or attorney fees?

2. **What are the possible future disputes between the parties?** For example—

- ▶ Changes in the IEP/BSP desired by either party?
- ▶ A new IEP that has to be developed?
- ▶ Alleged failures of either party to implement the IEP/BSP/settlement agreement?
- ▶ Alleged violations of law?
- ▶ Actions of either party that are allegedly inappropriate or uncooperative?

Note: Sometimes the parties agree to specifically exempt certain things (e.g., disciplinary matters).

The parties could agree to put any current or future dispute on the list even if it would not be complainable or hearable or does not even involve special education.

3. **Identify anything else that might be helpful process-wise**. For example—

- ▶ Provide suggestions, training, or advice to the parent, student, and/or district staff regarding the extent/nature of the student's disability, how it should be educationally addressed in the IEP, show the IEP should be implemented, and how they might work together (i.e., informal inservicing)?
- ▶ Recommend/direct possible changes in the IEP/BSP (both immediately for a "stay put" and after a complete review of the situation)?
- ▶ Facilitate a future IEPT meeting?

B. **Identify a possible person to serve as a third party**. Consider first the attributes necessary to do what the parties want done. Also, the parties must keep in mind the disability area involved, the person's "people skills" if any informal inservicing is to be done, and his/her availability (i.e., have the time to do what is necessary within the agreement's timelines). The district may also want to check on the person's fees.

Typically, the third parties I have used come from either higher education, persons in private practice as an educational consultant or psychologist, or a retired person previously involved in special ed with a district or parent/professional organization. Sometimes a person who serves as a hearing officer or mediator might meet the muster. There is certainly no reason why a person currently employed with a district or parent/professional organization could not serve in the role, but it is usually difficult for such a person to be perceived by both parties as neutral and independent.

Since this person needs to be mutually agreed upon by the parties, each party should suggest and check out persons who will have the trust, confidence, and respect generally of both the parents and districts, usually by having worked with both in some capacity. Usually, I provide or have the parties obtain from persons they want to suggest the person's resume and references from parents and districts with whom they have worked. The parties can check out the person regarding their "independence" and neutrality utilizing the references, as well as other contacts who might know the person, such as parent or district organizations, parent or district lawyers, others in the special ed field who might know the person, etc.

Sometimes I have had parties who were unable to agree upon a person and ask me as the hearing officer or mediator to name the person. I am willing to offer suggestions and give the parties my views as to various persons' attributes. But, I am extremely reluctant to recommend or appoint a person (although I have done so on a few occasions) because it undercuts the parties having "bought into," i.e., placing their trust, with the person selected.

Remember, even if the parties agree upon a particular person, that person has to be willing to accept the role. Accordingly, the parties must clearly describe what the role entails, preferably giving the proposed third party a copy of the agreed upon process.

The third party can be referred to as an "independent educational consultant," "third party," "ombudsman," or even the "umpire." What is key is that both parties are comfortable with the label used.

C. **Identify specifically how the process will work**.

1. **Information Gathering**: With regard to current disputes that the parties have identified, the first step in the process is for the third party to gather all relevant information.

For An Evaluation/IEP Review: If the dispute concerns whether an evaluation/reevaluation needs to be done, and if so, doing it, doing/reviewing a functional behavioral assessment, and developing/ reviewing a BSP, or whether particular programs, services, and/or accommodations should be a part of an IEP, then I suggest the process merely provide that the third party shall talk with the student, the parties, the various district staff who work with the student, private persons who work with the student, and anyone else the parties or consultants believe would be helpful. The third party should review all school and private professionals' records on the child. I note that by signing the agreement, the parent agrees to sign all necessary consents. Additionally, I suggest the third party may observe the student in school and other settings. Then, if after this review of the situation the third party believes additional evaluations of the students are necessary, the parties can agree that either the third party does them or they are done under the third party's direction. Usually, I suggest the third party may in his/her discretion attempt to "mediate" the dispute(s), but if such is not pursued or is unsuccessful, the third party shall provide both parties with a written report specifically addressing each disputed issue and recommending a resolution. Usually the third party would attend a subsequent IEPT meeting, maybe even facilitating it, to consider the recommendations.

For An Alleged Violation: If the current issue identified is an alleged violation of the settlement agreement, IEP, BSP, or the law, the third party might immediately schedule a telephone conference call with the parties to discuss how the necessary information would be gathered, usually during that call (with talking to other persons suggested by the parties or a review of documents occurring shortly thereafter). But, how the necessary information is gathered is left to the third party, as long as the manner is fair and impartial. The third party may in his/her discretion attempt to "mediate" the dispute, but if such is not pursued or is unsuccessful, he/she renders a written report recommending a resolution. If the parties do not accept the recommendation or settle the matter working from the recommendation, the parent may pursue other options under IDEA.

For Future Issues: If the parties desire the third party to decide future disputes, I prefer that the process require the party with the concern to advise the other party of it in writing. Thereafter, the parties should attempt to resolve it between themselves. Hopefully,

they will at some point be able to—plus it may save on the cost of the third party. But, if they cannot within a set number of days (say five or ten), then either party could submit the dispute to the third party and one of the above information gathering procedures would kick in.

Usually I suggest agreements provide that while both parties reserve the right to consult with counsel, counsel shall not participate in the informal proceedings of the third party. Again, to keep this quick and cheap by not involving the attorneys—yet fair.

2. **The Cost Of The Process:** Typically, the district pays the costs of the third party. But, on a few occasions in alleged "violation" situations it has been agreed that above a certain amount, the parties would share the cost in some fashion or that the "loser" would pay the costs (either being a disincentive to abuse the process).

3. **How Long Is The Process In Effect If Future Disputes Are Involved?:** Typically, up to the end of the current school year, although if it is near the end of that year, often the next school year as well. On a few occasions the parties have agreed to have them go on for two or three years or provide for one-year extensions by mutual agreement of the parties.

4. **Additional "Inservicing" Function:** Given the third party in this process will have the confidence of both parties, expertise in the disability area involved, and hopefully a certain degree of people skills, I usually suggest that the parties agree that while carrying out all of the above activities, the third party, in his or her discretion, may provide suggestions, training, or advice to the parents and/or district staff regarding the nature of the student's disabilities, the parties' attitude in addressing the student's needs, how the IEP should be implemented, how they might work together more cooperatively, etc. For example, a teacher with a bad attitude regarding making accommodations or does not know why or how. Or a parent who does not understand their child's disability or how to deal with it.

5. **Implementing The Agreement:** To hopefully avoid problems in implementing the agreement, I suggest provisions regarding who shall get the third party started and who within the district is responsible for implementing the agreement.

V. MAKING THE THIRD PARTY AN ARBITRATOR.

A. **What's binding arbitration?** It's a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding." Chappell, "Arbitrate ... And Avoid Stomach Ulcers," 2 Arb Mag., Nos 11-12, pp. 6, 7 (1944).

B. As with anything "new," people's perceptions/concerns must be addressed. Some people have heard bad things about or do not like the notion of "arbitration." Parents may say, "I don't ever want to give up my rights!" – even though their right to go to hearing in practice may be tainted by unfairness, take too long, and cost too much. On the other hand, districts may say, "we don't ever want to give up control to a arbitrator!" – even though the question is not giving

up control, for they will, if not to a mutually selected arbitrator but to a hearing officer or later a judge. Advocates/attorneys will also need to do some self-assessing.

C. **Foot In The Bucket:** For all practical purposes, once the third party makes his/her recommendations, any hearing officer would probably follow them absent very good reasons. Therefore, the parties are almost "bound" anyway! Plus, you lose giving some stability to the relationship if the third party is only recommending. The key in this regard is typically how comfortable the parties are with who they can agree upon.

D. **Aspects Of Decision Making:** I usually suggest that the authority of the arbitrator be described as that of a hearing officer under IDEA. The parties can then agree to add to that authority (e.g., determine a dispute regarding attorneys' fees) or remove or clarify certain things (e.g., relief cannot include placement at a private school, cannot issue sanctions or fines, etc.).

Usually it is provided that the arbitrator must follow IDEA and state special education law.

Typically the third party's decision is stated to be "final and binding" upon the parties, both parties waiving any right to appeal or take the dispute to any other forum. Again, there are alternatives, such as the parties reserving the right to appeal the third party's decision with regard to any future IEP. Or, on a few occasions where the agreed upon process arose in settlement of a pending hearing, the parties provided for an appeal to the hearing officer on very limited grounds (e.g., the third party's decision was educationally unreasonable).

Depending upon what the parties have agreed to have the third party decide, neither party could utilize any other procedure (e.g., complaint or hearing) regarding those items. For example, if the third party is going to decide alleged violations of the IEP or law, the parent could not file a complaint or request a hearing concerning those items. If the third party was going to determine requested changes in an IEP or BSP, then neither party could request another IEPT meeting. In short, the parties agree to arbitrate in exchange for giving up the right to utilize IDEA's complaint and/or hearing processes.

E. **Protection Against Later Contentions Of Illegality:** Since the Office of Special Education Programs (OSEP) continues to take the position that neither party can waive their rights under IDEA, despite numerous and notable court rulings to the contrary, there is a risk that either party could later attack the agreement. In an attempt to provide some degree of protection and commitment, I typically suggest the parties include a provision that any party attacking the agreement for any reason must first exhaust administrative remedies by submitting such to a hearing officer under IDEA.

F. **Miscellaneous:** Of course, the agreement can include any other provisions the parties desire. Common are those declaring a "clean slate" (or this addresses all current claims/problems), addressing attorney fees, or excluding disciplinary matters.

V. COMMON QUESTIONS AND CONCERNS.

A. **Is Arbitration Legal?** As noted above, OSEP would say no given its position that neither party can waive any rights under IDEA. However, there are several court cases under IDEA involving settlement arrangements where the parties do give up or waive rights. Such has been found legal where an informed party does it deliberately, voluntarily, and with the advice of counsel. See for example, W.B. v Matula, et al, 23 IDELR 411 (3rd Cir 1995) and D.R. v East Brunswick, 20 IDELR 957 (USDC NJ 1993); rev'd on other grounds, 25 IDELR 734 (3rd Cir 1997). But, these cases address current, known issues in dispute. To my knowledge, the waiver of rights with regard to the resolution of future unknown issues has not been addressed by a court in a special education context. An arguably similar situation has been addressed by courts in an employee-employer context where employment agreements, including a binding arbitration clause, have been upheld even when the clause covers potential future allegations of civil rights violations. However, no "substantive" rights may be waived (e.g., the right to a FAPE) and the arbitral process must be fair. Thus, the risk of illegality is greater regarding future disputes.

In the approximately 150 times I have utilized this approach, rarely has the legality of such an agreement been attacked by any party. But, since it might be, as noted above, I would suggest as part of the agreement that the contention first be presented to an IDEA hearing officer who hopefully would understand the approach and the situation generally much better than the typical state or federal court judge.

In one situation I served as hearing officer and facilitated the parties agreeing on the use of four different third parties to carry out various responsibilities (which addressed the resolution of both current and future disputes). After each did and the parent disagreed with the results, the parent attacked the agreement. The agreement had a provision, such as the one noted above, that required me as the hearing officer to rule on the agreement's legality. I did so, finding that under the Matula standards the agreement was voluntary and it was not against IDEA or public policy. K.C. v Plymouth-Canton Comm Sch, 104 IDELR 1926 (SEA MI 2003). The parent appealed to a state review officer who affirmed my decision that the agreement was voluntary but ruled it was against public policy. 104 IDELR 1928 (SEA MI 2003). The district appealed to federal court where the parties requested the court to vacate the SRO decision and reinstate mine, which it did finding the agreement was knowingly and voluntarily executed, as well as consistent with IDEA and public policy (40 IDELR 178 (USDC MI 2003)).

Of course, the parties at anytime could just agree to scrap the agreement and go back to one of the IDEA processes. They are no worse off. And, depending upon whether the third party/arbitrator made a recommendation/determination before the agreement was attacked/abandoned, that recommendation/determination could probably be used by a party in any hearing. So, the party who obtained a favorable recommendation/determination is still probably better off.

B. **Isn't This Risky?** Yes, but there is a degree of risk in any process. Granted, here each party is sticking their "foot in the bucket" with a third party or giving up a lot to an arbitrator, but at least you control who it is, the process that will be used, and to a large degree

your costs. In the IDEA complaint and hearing processes, you generally give up even more—you have no control over whom the decision-maker is, the process, or costs! Accordingly, if you pick someone whom you have some degree of confidence knows what he or she is doing, including knows about special education, how it should work in the disability area involved—you really can't do much better than that in terms of reducing your risk. Granted, the person could still make a mistake or remember—you could be wrong.

C. **Does This Approach Work?** Unquestionably, yes! At a minimum, the parties get a recommendation or answer to their dispute, which even if they disagree with, they usually can accept it since it comes from an independent person who heard them and knows what they are doing. Beyond this, in many of the situations the relationship between the parties improves, often dramatically, as the third party/arbitrator works with them (e.g., informal inservice and in addressing and deciding their various differences).

D. **Should A Parent Really Give Up These Important Legal Rights To Request A Hearing Or File A Complaint?** No doubt, "rights" are important, but a parent has to assess what they are worth as a practical matter versus what they can get by deferring or giving them up. If you defer or give up the right to a hearing that you believe is not fair, will take too long, and will cost too much (assuming you can find and pay for an attorney) in exchange for a third party/arbitrator whom you helped select and a quicker, cheaper process—that's a pretty good trade off. And, it's not like you are deferring or giving up your rights forever, but only for a specific period of time, say a semester or a year.

E. **Why Would A District Want To Get Into One Of These Arrangements?** Districts can look at a potential hearing situation and say to itself that our IEP will be given some deference (assuming it was properly developed) and we have greater resources, including an attorney. But, most acknowledge they would rather spend their money on kids than attorneys and have a good working relationship with parents. Plus, they are willing to have someone else, whom they helped select, review whether what they believe is appropriate, actually is. Moreover, if the third party or arbitrator can hear and address concerns that they have regarding the parent's actions, this is something not available to the district under normal IDEA processes. Bottom line, they gain much better control of costs and the processes available to the parent.

F. **If I Am A Teacher, Related Service Provider, Or Another Type Of District Staff Person, Why Should I Care About This Approach?** Many times in more serious disputes of the type noted above, it is one or more of you and the parent who are clashing on a daily basis. This approach, unlike any other alternative, offers some real hope of practically dealing with your situation (e.g., quick resolution of disputes, quick consideration of desired changes in IEP/BSP, lack of parent cooperation, informal inservicing for you or the parent, etc.). If your director does not consider the approach as a possibility, suggest it.

G. **When Is This Kind Of Arrangement Set Up And Agreed Upon?** Anytime. It might come when the parties dispute whether an evaluation or reevaluation is necessary. Or, it might come on the eve of an apparent troublesome IEPT meeting, in the middle of such a meeting, or at the end when a parent is considering mediation or a hearing. It most often comes

as a product of mediation, with some of the current disputes being resolved in the mediation, while other current disputes and future disputes are left to this type of a process.

H. **How Do Parents And/Or District Ever Find A Good Person To Do This?** First, remember they don't need to be in your town. It would be nice if they were in your state, but they even could be in another state. Depending upon the situation, their physical presence may not be necessary at all. And, if it is, it may be just for the first time to observe the child, do evaluations, meet with the parties, etc. Thereafter everything could be done by telephone conference call.

Next, typically I have found persons who are agreeable to both parties come from institutions of higher education (although I and the parties make sure the person has actually been in or around classrooms), educators who are now independent private consultants (typically who have worked with both parents and districts or at least been involved with both parent organizations and districts), social workers and psychologists in private practice (again who have worked with both parents or parent organizations and districts and who are acquainted with special education, its jargon, and how it works), and persons from hospital or other clinical settings (again ensuring that they are acquainted with special education, its jargon, and how it works). There have been a few occasions when the parties agreed upon a person whose current employer may involve a school district, another school district, or a parent/professional organization. Typically, one or the other of the parties will not be sufficiently comfortable with such a person's independence. Finally, some persons who serve as hearing officers or mediators, depending upon their background and skills, might serve in this role.

To identify persons, the parties might contact their advocate or attorney or various parent/professional organizations. Over the years for me, it has really come down to networking and keeping an eye open for persons whom you come across that might be able to serve in this capacity in some situation in the future.

Normally, I suggest, unless both parties and their advocates/attorneys are familiar with the person, to get a resume of the person and both parent and district **references** for persons with whom they have worked to check on whether they are in fact knowledgeable and a "straight shooter."

I. **How Much Do These Third Parties/Arbitrators Really Cost?** The cost ranges widely depending upon the type of person serving in the role. If the person were to be a university professor, it may be in the $70-$125 range. Private consultants will probably be in the $100-$150 range. On the other hand, if they are an attorney (which is rare), they would typically charge their normal hourly rate, which may be in the $125-$200 range.

No matter what the hourly rate of the person, with the rarest of exceptions, districts have been most happy with the vastly reduced cost of this type of dispute resolution process, which, remember, is designed to be relatively quick.

J. **Do We Need To Give Up The Right To Have An Attorney Involved?** No, you don't need to but—let's be honest—when attorneys get involved, costs go up, there is greater

potential for delays to crop up, and too often it does not help getting the parties themselves to work better together. In the typical arrangement, the parties reserve the right to consult with their attorney. But, the attorney does not participate in the actual informal dispute resolution process. Often it is agreed that the parent can have an advocate participate in the process. But, in any event, these arrangements should address whether there is any potential for the parent getting attorney's fees.

K. **Before Entering Into An Arbitration Agreement, Should Each Party Consult With An Attorney?** Absolutely yes. For any waiver of rights under IDEA to be legal and valid, both the parent and district must be informed regarding the legalities of the situation (i.e., what they are getting and what they are giving up). If one or both parties have not consulted with an attorney regarding entering into the agreement, the parties could still enter into it and everything might work out fine. But, if a party had second thoughts because they had not consulted with counsel or otherwise, they would be in a better position then to attack the agreement. In other words, if the parties did not consult attorneys, the risks of it being deemed invalid are heightened significantly.

I strongly encourage (almost demand) that both parties have any proposed agreement reviewed by their attorney and discuss what they are giving up and getting under it.

Hopefully, both parties will get legal counsel from attorneys who know something about special education and the problems with regard to the complaint and hearing processes discussed above. Otherwise, the attorney may all too quickly misassess the situation in terms of the risks and benefits and advise the parties out of hand to maintain their "rights" and reject this approach.

With regard to parents, access to a special education attorney may not be easy. One might be available from P & A, a parent-training center, or some other parent advocacy organization. Some well-trained advocates, who know the law as well as or better than some attorneys, might also assist the parent. Finally, on some occasions I have suggested the district provide the parent with money (e.g., $250) to obtain such legal advice (and the districts have done so—albeit reluctantly as a last resort).

L. **Are The Arbitrator's Decisions Enforceable?** In the approximately 150 times I have used this approach it has never come up. Because the parties have bought into the process, they comply with the arbitrator's decision, even if it is meant paying a fine of a couple hundred dollars! The parties could actually put a provision in the agreement as to what would happen (e.g., each party could go to court, the arbitrator could go to court, the parent could file a complaint, etc.). But, I typically do not.

M. **What Happens If A Parent Or District Violates An Arbitration Agreement By Asking For/Calling An IEPT Meeting, Filing A Complaint, Or Requesting A Hearing?** If a party asks for or calls an IEPT meeting (and the agreement says the arbitrator is to receive, hear, and decide desired IEP changes), the other party should remind the party asking (or calling for the IEPT meeting) of the agreement's terms. If that party still wants to ask for/call an IEPT

meeting (and not put their desired changes to the IEP before the arbitrator), the other party may ask the arbitrator to determine whether the agreement is being violated.

If a party (usually the parent) files a complaint or either party asks for a hearing, the other party should provide the compliance officer or hearing officer (as the case may be) with a copy of the agreement. Further, they should ask the compliance officer or hearing officer to honor the agreement by referring the matter back to the arbitrator or, in the alternative, to a hearing officer to determine the validity of the agreement (as the agreement often provides) which is, in effect, being attacked by the party filing the complaint or requesting the hearing. This has happened only a couple times, with the arrangement being honored by the compliance officer or hearing officer referring the matter back to the arbitrator or hearing officer.

N. **What Have Been The Biggest Problems In Implementing This Approach?** Probably the biggest has been that a couple of the professionals who are very good and often agreed upon by the parties to serve as the third party/arbitrator get over committed schedule-wise. The professionals then have difficulties in living up to the expectations of the parties, and sometimes even the terms of the agreement itself. The best way to avoid this is for the parties to attempt to assure before they agree upon the third party/arbitrator as to his/her availability time-wise to commit to the responsibilities under the agreement.

The other problem has been the failure of the district, after the agreement is signed, to immediately implement it by contacting the third party/arbitrator. This problem can be minimized by having the agreement clearly spell out whether the district, parent, or even the hearing officer/mediator has the responsibility to provide the arbitrator with a copy of the agreement and request he/she start implementing it (as they had previously agreed to do).

VI. STEPS TO IMPLEMENT AGREEMENT.

A. **Prepare the document.** Work out the details of the arrangement (e.g., what the third party/arbitrator is to do, the process, etc.) and get them written down. See the "sample agreement" with various options (Attachment A). Each party should review this with their attorney.

B. **Check on the third party/arbitrator's willingness and availability.** Again, if necessary, check to make sure the third party/arbitrator is willing to do what the parties want and is reasonably available. The parties should agree for one of them (or the mediator, hearing officer, or compliance officer) to contact the third party/arbitrator in these regards. The actual agreement might be provided for the third party/arbitrator to review.

C. **District independent contract with third party/arbitrator.** Often a district will want to enter into an independent consultant contract with the third party/arbitrator (in the rare situation where the parents may be involved in paying some costs, they might be a party to this contract). Many districts have form contracts for this purpose. The primary purposes of this contract are to establish that the third party/arbitrator is an "independent contractor" rather than an employee of the district and what the district will be charged.

SAMPLE AGREEMENT

_____ and _____ _____, parents of _____ ("Parents"), and the _____ School District ("District") agree:

1. **The Third Party:** *Note:* Remember, the parties should agree on what to call this third party given what they want the third party to do. I use various terms, including consultant, independent consultant, third party, umpire, etc. While the name does not make any difference legally, sometimes it does to one or both parties. The provisions in brackets [ ] are suggested when the third party would serve as an arbitrator.

OPTION 1 — The parties have agreed on the third party.

_____ shall serve as a third party to address the parties' disputes regarding the provision of special education programs, related services, and accommodations for _____.

OPTION 2 — The parties agree to find an third party.

To address the parties' disputes regarding the provision of special education programs, related services, and accommodations for _____, the parties shall mutually agree upon a third party on or before _____, 200__. The third party shall have a background, expertise, and experience in addressing the educational needs of students with _____. The parties and mediator/hearing officer shall immediately suggest possible persons who might serve in this role (including resumes and both parent and district references).

If the parties cannot agree upon such a person within ten days from the date of this agreement, it is agreed the mediator/hearing officer shall appoint the third party after consulting with both parties/the agreement is terminated.

2. **The Third Party's Responsibilities And Process:**

OPTION 1 — Disputed issues involve "evaluation" activities *(e.g., eligibility or the provisions of an IEP and/or BSP).*

The third party will review _____'s situation, including, but not limited to, talking with _____, his/her parents, District staff, and outside professionals who have evaluated or worked with _____, review the records of the District and others who have evaluated or worked with _____. The Parents agree to sign the consents necessary to allow the third party access to all of the above persons and their records. In addition, the third party shall observe _____ in school and such other settings as the third party believes appropriate. If, after reviewing the situation, the third party believes additional evaluations of _____ are necessitated, both parties agree that either the third party or other persons at the third party's direction shall conduct the additional evaluations. By signing this agreement, the Parents agree to consent to any such additional evaluations.

Upon completing the above activities, the third party shall provide the parties with a written report, including specific recommendations [determinations] with regard to each aspect of _____'s educational programming in dispute. The IEP team at a meeting shall consider the third party's recommendations. [The determinations of the third party in these regards shall be binding upon both parties. Accordingly, the parties waive the convening of any IEPT meeting. Rather, the determinations of the third party shall be placed on the District's customary IEP form in a manner acceptable to the third party.]

OPTION 2 — The matters in dispute do not involve "evaluation" activities *(e.g., alleged violations of an IEP, BSP, or the law).*

For current disputes. The third party shall address the following current disputes between the parties:

A. (List all current disputes not already otherwise resolved, e.g., alleged violations of the IEP, BIP, or a law.)

For future disputes. The third party shall address the following future disputes between the parties that arise during the ____-____ school year:

A. Any alleged violation of this agreement [or any item mentioned in this agreement concerning which the parties agreed to try to agree but could not].

B. Any allegation that a party has violated a provision of _____'s IEP, BSP, or any special education law or rule.

C. Any allegation that a party is failing to act appropriately and cooperatively in implementing _____'s educational program [or this agreement].

D. Any dispute between the parties concerning a proposed evaluation/ reevaluation or change in _____'s IEP/BSP.

E. Any dispute regarding the IEP to be developed for _____ in the spring/fall of ____ for the ____-____ school year.

With regard to any of the above items that might be submitted to the third party, a party must first advise the other party in writing of their concern. If the parties between themselves cannot resolve the dispute within seven calendar days, either party may submit it to the third party in writing (with a copy to the other party).

[For both current and future disputes] The third party, in his/her discretion, may attempt to mediate resolution of the dispute. But, if mediation is not attempted or is unsuccessful, the third party shall immediately decide how he/she shall proceed (e.g., by scheduling a telephone conference call with the parties or talking to the parties separately). Other than the minimal requirement of giving both parties the opportunity to advise him/her of

their position and their basis for it, the third party has the discretion to gather information and conduct the information-gathering process informally as he/she deems appropriate, as long as he/she does so in a manner that is fair and impartial. He/She shall issue a written report to the parties within ___ days of receiving a dispute with a specific recommendation [determination] regarding disputes issues. In doing so, he/she shall follow IDEA and state special education laws [and have the authority of a hearing officer under the Individuals With Disabilities Education Act (IDEA)]. The third party's decision shall be final and binding upon the parties, with neither having any right to appeal with the exception of Item E above. With regard to either party disputing the IEP developed for _____ for the ____-____ school year, either party may request of the third party a more formal hearing (which shall be in his/her discretion) and reserve their right to appeal.

While both parties reserve their right to consult with counsel, counsel shall not participate in the informal proceedings before the third party although the parent may have a nonlawyer advocate participate.

[Given the above provision, neither party may request an independent educational evaluation, the convening of another IEPT meeting, request a due process hearing, or file a complaint under IDEA or with the Office of Civil Rights concerning any current (or future) dispute submitted to the third party above.]

OPTION 3 — Possible additional inservice responsibilities.

While carrying out the above activities and responsibilities, the third party may in his/her own discretion provide suggestions, counsel, or advice to _____, the Parents, or any District staff regarding the nature and extent of _____'s disabilities; the needs such disabilities do (or do not) present for _____; how _____, the Parents, and District staff might appropriately

respond to address those needs; and how the parties might more cooperatively work together in partnership to provide _____ with an effective educational experience.

OPTION 4 — Third party facilitates IEP.

Approximately _____ weeks prior to the end of the ____-____ school year, an IEPT meeting shall be scheduled to develop an IEP for _____ for the ____-_____ school year. The third party shall facilitate this IEPT meeting.

3. **The Cost Of The Process:** The District shall pay for the cost of the third party's fees and out-of-pocket expenses (including evaluations).

Note: Although unusual, sometimes to act as a disincentive to a party to overuse the third party or at some point share the cost of the third party, one of the following options is used.

Splitting the costs The District shall pay the third party's fees and out-of-pocket expenses up to the sum of _____ Thousand Dollars. Thereafter, the fees and costs of the third party shall be split between the parties, with the District paying ____% and the Parents paying ____%. **OR** (Thereafter, the losing party shall pay the third party's fees and out-of-pocket expenses. If in the third party's discretion each party lost in part, the third party shall allocate the percentage of his/her fees and expenses to be paid by each party.)

4. **Other Miscellaneous Provisions:**

Attack on arbitration agreement's validity. Should either party allege that any provision of this agreement is invalid or unenforceable for any reason, that party must first exhaust administrative remedies by submitting such an allegation to a hearing officer under IDEA. Should either party, in effect, challenge the validity of this agreement or attempt to circumvent it by requesting a hearing or filing a complaint, the parties agree that administrative

remedies under IDEA must first be exhausted by submitting the issue of the agreement's validity to a hearing officer. The parties agree that if a complaint is filed, the investigating agency shall refer it to the third party in accordance with this agreement (unless the party filing the complaint has obtained a ruling declaring the agreement invalid in this regard by an IDEA hearing officer or court). _____, as the hearing officer in the pending matter, shall be requested to serve as the hearing officer for these purposes if such an allegation (or situation) arises and, accordingly, shall be requested to retain jurisdiction solely for such purposes.

Reason for arbitration agreement. The understandings of the parties entered into in this agreement are somewhat unusual, including the waiver of various rights under IDEA. However, both the Parents and District do so voluntarily, being fully informed of their rights, with the assistance of legal counsel. In addition, they enter into this agreement based on their respective beliefs that by utilizing this approach, not only will _____'s educational needs be appropriately addressed, but hopefully their ability to work in partnership to educate him will be enhanced as well. They agree to act appropriately and cooperatively in implementing this agreement and educating _____. By entering into this agreement, neither party admits any wrongdoing or that the parties' claims lacked merit. Rather, the parties desire to establish a mutually agreeable process to resolve their current (and future) differences.

Exempt disciplinary matters. This agreement is not intended to address the rights or responsibilities of either the District or the Parents with respect to a situation that might result in _____ being disciplined. More specifically, the District maintains its rights and responsibilities to discipline _____ as it believes appropriate under the law, District policy, and _____'s IEP/BSP. On the other hand, the Parents reserve their rights and responsibilities with respect to participating in any processes relating to such discipline (e.g., a manifestation

determination meeting) and, if they deem it appropriate, challenging any such discipline or action relating to it (e.g., requesting a due process hearing). Any alleged violations of the IEP/BSP shall still be addressed first under the procedures set forth above.

Clean slate intent for arbitration agreement. By entering into this agreement, it is the intent of both parties to resolve and have a "clean slate" of all claims or concerns up to the date of this agreement by either party regarding the provision of special education programs and related services to _____ under IDEA, Section 504, and state special education laws (except as they will be addressed and resolved through the utilization of the third party as provided above), including, but not limited to, such things as claims that _____ was not appropriately evaluated/ reevaluated, provided with appropriate IEPs/BSPs, such IEPs/BSPs were not appropriately implemented, or the Parents should be reimbursed for an expense.

Attorney fees. The District agrees to pay the Parents and their attorney, $_____, jointly, within fifteen (15) days of the final signature on this agreement in settlement of all claims for attorney fees and related costs under IDEA or otherwise. Should the Parent choose to consult with an attorney regarding any aspect of this agreement's implementation or otherwise while this agreement is in effect, the District shall not be responsible for any attorney fees and related costs the Parent incurs.

Withdraw pending hearing/complaints. The hearing previously requested by the Parents on _____, is hereby withdrawn by the signing of this agreement. The complaint previously filed by the Parents dated _____, is hereby withdrawn by the signing of this agreement.

Upon the signing of this agreement, _____ shall forward a copy of it to the hearing officer who by agreement of the parties is requested to dismiss the hearing. In addition,

the Parents shall send a letter to the Department of Education withdrawing their prior complaint dated _____.

Engagement of third party. Upon the signing of this agreement, _____ shall immediately forward a copy of it to the third party and request that he/she contact the parties as soon as possible to commence its implementation.

District "manager". _____ is designated by the District to be responsible for this agreement being implemented, including receiving from the Parents any written concerns of a potential dispute under paragraph 2 above.

Enforcement of award. Either party may enforce an arbitration award in a court of competent jurisdiction.

Changes to agreement. This agreement may be modified, but only by a written document signed by each of the parties. A copy of any such change shall be sent to the third party.

Dated: _____ _____
Parent

Dated: _____ _____
Parent

Dated: _____ _____
Director of Special Education
_____ School District

REMEMBER: ***The parties must modify the above-suggested language to fit their specific situation and what they have actually agreed to do. Then, each should review it with their attorney before signing.***