

Dispute Resolution in Special Education

Self-determination, Dignity,
and Imagination are Key

By Philip Moses

Gabriel and his extended family immigrated to the United States from Colombia several years ago. Gabriel's mother, Elena, wants her son, who has cerebral palsy and developmental delays, to attend their neighborhood school in a regular fourth-grade class, where, she is convinced, he will learn best. Although Gabriel does not have any behavioral problems, Elena worries that he will develop them if he spends most of his day in a special education classroom. School officials, however, are certain that Gabriel's current special education setting is appropriate and want him to stay there. The officials also believe that this placement meets the "least restrictive environment" requirements of federal law. The school's administrators have offered to go to state-sponsored mediation to resolve the matter,

but Elena is reluctant to do so because after many frustrating meetings, she feels that she and school officials can no longer talk to each other constructively. In addition, Elena's sister had a bad experience with a court-appointed divorce mediator who seemed both directive and impatient with the sister's limited English, and Elena fears the same might happen to her. At the same time, Elena has learned that hiring an experienced lawyer in her rural area will be expensive and maybe even impossible, since the local bar has no attorneys who regularly work on special education matters. How can she afford a big legal fee and the emotional costs of pursuing litigation? If she does not pursue legal remedies, how can she be sure Gabriel can learn in a way that she believes will allow him to thrive and succeed?



Gabriel's situation¹ is just one example of how access to justice can be in jeopardy when a parent in a special education dispute considers her options, including ones she sees as challenging and perhaps disrespectful. Special education dispute resolution has changed considerably in recent decades, and this article examines the contours of dispute resolution in special education today — and how it has evolved to provide a broader landscape of options and exemplary practices, reflecting a pathway to justice that is much wider than routes found within the narrow limits of the law.

A Complex Terrain

While most conversations between educators and parents of children with disabilities are positive, interactions can be marked by strong emotions, differing perceptions of what the student needs and can accomplish, and disagreements about which educational programs, methodologies, and services can help a child lead the fullest life possible. Special education conflicts are often difficult to resolve and, if poorly managed, can lead to intractable situations that are costly as well as destructive for all involved. Ultimately, they can be extremely damaging to the educational needs and future prospects of the child who is at the heart of the conflict.

When parents express concern that a child is not receiving an appropriate education, designing and implementing dispute resolution systems are complicated by numerous factors. These include complex federal and state regulations; the involvement of multiple parties, each of whom may have different interests; conflict resolution practices that may be culturally unresponsive; and, in many parts of the United States, a scarcity of lawyers who can represent families in such matters.

(Other issues that this article does not address can also affect access to fair and just educational opportunities in special education. These include fiscal limitations, which make it difficult to sustain general teacher levels and current educational resources, let alone provide individualized services for students with disabilities; tension between general and special education systems; and underused conflict resolution procedures in states — typically smaller states — where there are few special education disputes.)

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Fundamentally, two central realities — that the family and the school system will probably have a long-term relationship and that they share an interest in the child's education and development — suggest that conflicts related to special education programs and services are best ameliorated through non-adversarial, collaborative dispute resolution mechanisms. Unlike the parties in a contract dispute, for instance, who may not have a compelling interest in continuing their relationship, parents and schools need each other, and a resolution that addresses their common interests often will preserve what should be a collaborative working relationship in ways that would not be possible through an adversarial, decision-making procedure. Just as important, ample evidence exists that outcomes for children are vastly improved when parents and educators have a shared vision and engage as partners working toward creating high expectations and meaningful results.

Many people are surprised to learn that in the United States today, nearly seven million individuals under the age of 21 have an identified disability.² Each of these children falls under the Individuals with Disabilities Education Act (IDEA), enacted by Congress and considered an indispensable civil rights law, which states (in part), “Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”³

Originally adopted as the Education for All Handicapped Children Act of 1975 (Public Law 94-142) and amended several times, most recently in 2004, the legislation set forth formal procedures for dispute

resolution while at the same time indicating a strong preference for the more collaborative methods of mediation and facilitation and for less reliance on adversarial and contentious methods (such as due process hearings and written state complaints). The law states: "Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways."⁴ This preference was reflected in the Summary and Analysis of Comments and Changes preceding the 2006 final regulations for Part B of the IDEA. There, the US Department of Education noted that "early identification and resolution of disputes would likely benefit all."⁵

Serving as the bedrock under IDEA's core principles of equality of opportunity, full participation, independent living, and economic self-sufficiency are a number of provisions that serve as corridors allowing students with disabilities to access what, in the end, is a "just" educational experience. Under IDEA, every child who is suspected of having a disability is entitled to an "appropriate evaluation." Once identified, a child with a disability is entitled to a "free appropriate public education"; a written document called an Individualized Education Program (IEP) developed by a team that includes the parents; placement in the "least restrictive environment" possible; parental involvement and decision-making in the planning process; notification of a planned evaluation; access to materials related to their child and participation in all meetings regarding their child's placement; and procedural safeguards and dispute resolution mechanisms to help families enforce their rights and resolve

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disagreements between parents and schools. When differences or conflicts arise, parents and schools can request mediation, have a written complaint investigated, or file for a due process hearing, all with their state education agency. They can also attempt to resolve a due process complaint through a resolution meeting in advance of a hearing. Ultimately, they can appeal a hearing decision in state or federal court. Each of these dispute resolution mechanisms, available to both parents and school systems, comes with its own benefits and limitations.

Disputes in special education can generally be sorted into three categories: disagreements about the design of educational programs and services for a student with disabilities; those about the delivery of those programs and services; and those involving a breakdown in relationships because of communication difficulties, lack of trust, or misperceptions of intent. Most disputes, like the one involving Gabriel and his mother, Elena, have elements of all three.⁶ Using the language of the IDEA, these disputes often are related to a "free and appropriate public education" as well as whether the student is receiving educational services in the "least restrictive environment." Intractable disagreements around these matters are often the result of a breakdown in communication between the school and the family, leading to the deterioration of what probably once was a healthy relationship.

While a sound procedural safeguard system is essential to the administration of justice, parents and school leaders are best served when states invest in the prevention of disputes, the early management of disagreements, and in non-adversarial conflict resolution processes. To facilitate the development of high-performing, state-level dispute resolution systems that conform to the law and, more important, offer an expanded range of collaborative methods, beginning in 1998, the US Department of Education (through the Office of Special Education Programs) funded the national Center for Appropriate Dispute Resolution in Special Education, known as CADRE.

Since its founding, a core component of CADRE's work has been assisting state education agencies with implementation of the dispute resolution provisions found in IDEA. But CADRE's mission is much greater than just helping states ensure that their

systems comply with federal law. CADRE supports education agencies, families, and service providers in accessing the full continuum of appropriate dispute resolution processes. The vision and purpose is to empower families and schools to work together more productively, create partnerships in which individual perspectives are valued, encourage everyone to consider collaborative processes as a first choice for resolving differences when informal talk has failed, and help keep the focus on children's health, education, and well-being.

A Continuum of Options

Fortunately, the landscape of early dispute resolution options has evolved to offer most families and schools a range of relational-oriented, collaborative methods for resolving disagreements with processes that are aligned with the principles of procedural justice. CADRE's Continuum of Dispute Resolution Processes and Practices (Continuum) reflects both the IDEA's required procedures and the "positive and constructive" approaches preferred by Congress.⁷

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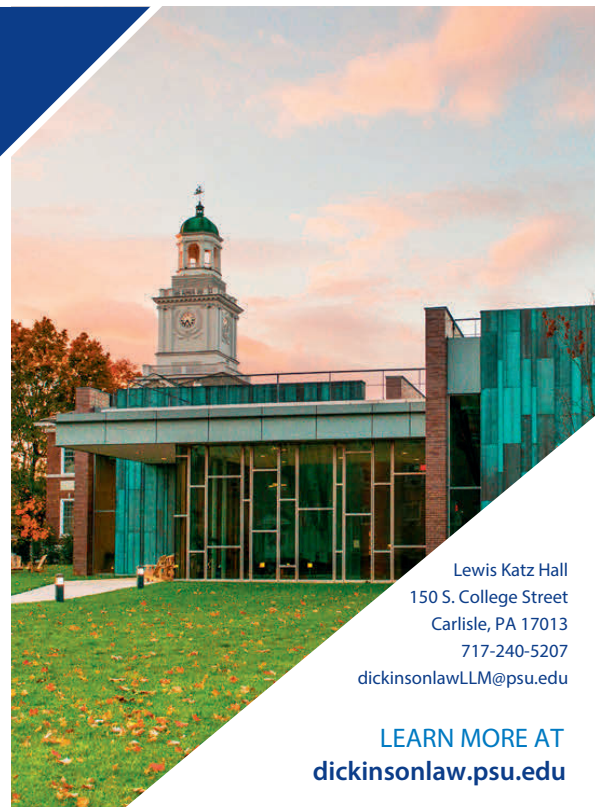
(Many readers will be familiar with the construct of CADRE's Continuum, since a similar model has been used for decades as a conceptual framework in the field of dispute resolution.) CADRE's Continuum (see the illustration on page 38 or visit <http://www.directionservice.org/cadre/continuumnava.cfm>) graphically depicts the range of dispute prevention



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

and resolution options that might be available within a state and arranges them into stages of intensity or levels of intervention. To help people understand how each option relates to others, the Continuum puts dimensions such as “rights-based” versus “interest-based” and “informal/flexible” versus “formal/fixed” at the bottom of the model.⁸

Knowing that stakeholders benefit most when their disagreements are addressed early, CADRE promotes a design approach in which an exemplary dispute resolution system has a variety of processes available along the Continuum earlier than the required mechanisms (Stage IV–Procedural Safeguards). A parent such as Gabriel’s mother, who is worried about going to mediation or about hiring a qualified lawyer, could be helped by accessing a process that falls under Stage II (Disagreement) such as a case manager or telephone intermediary, or under Stage III (Conflict) such as an IEP facilitator or ombuds.

This Continuum doesn’t represent an expanded system of procedural fairness by itself; how families and educators are informed of their options, including assistance in determining which approach is most appropriate to their circumstances, is important. If people are going to take advantage of early-intervention tools and options, they first must understand

what those tools and options are all about, so educational materials are crucial. As they proceed, they also need good information and resources that can help them prepare effectively.

Exemplary Practices and Future Avenues

CADRE has identified the characteristics of exemplary dispute resolution systems.⁹ After close examination of high-performing special education dispute resolution systems in four states (Idaho, Oklahoma, Pennsylvania, and Wisconsin), CADRE’s analysis identified the features common to these systems and the elements fundamental to their success. These four systems, while very different in design, management, and scope, share basic characteristics that every state system should endeavor to emulate.¹⁰

CADRE identified the following characteristics for an exemplary dispute resolution system:

- Active and meaningful engagement of a broadly representative group of system stakeholders in planning, promotion, evaluation, and improvement activities;
- Programmatic oversight guided by a clear and integrated vision and a management structure

that includes specific responsibility and authority for coordination and performance of the system;

- Financial and personnel resources adequate to support all system components;
- Protocols and activities related to personnel and practitioner standards, training, and performance;
- Transparency in the design, implementation, and evaluation of the system;
- Collection and use of evaluation data to guide continuing system-improvement efforts.

Of these critical features, many believe stakeholder involvement is the indispensable ingredient, consistent with the disability adage, "Nothing about us without us."

Restorative Justice may be the next contour in the landscape of special education dispute resolution. To address the increasingly challenging situation of children with disabilities being disproportionately suspended and removed from the classroom for

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disciplinary reasons, restorative practices, which include a range of approaches from informal framing of everyday conversations to much more formal circle processes, have promise for addressing a number of weighty educational concerns such as bullying and discipline. As evidence begins to emerge that Restorative Justice is effective, these practices, which seek to bring about a meaningful change in parties' perceptions and behaviors, may have a secure place on the Continuum.



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A Future Filled with More Dignity

Special education is about dignity. How we educate and prepare all children, including children with disabilities, to live the fullest lives possible is really about dignity. But when we scan our local, national, and global landscapes, we notice that dignity is in short supply. In a world increasingly challenged by polarization, with striking political divisiveness and huge gaps between the haves and the have-nots, now more than ever we must find a more dignified approach to resolving differences. If we accept the proposition that special education is ultimately about self-determination, we must also believe that dignity should be embedded in all methods for resolving special education disputes: dignity within the process for each participant and certainly for the child.

Surely both Gabriel's mother and Gabriel deserve to know about all their options early on, perhaps when Elena first talks with school officials about whether a special education setting is best for her son. Indeed, if family members and educators develop a strong relationship early on, the bonds of that relationship will help resolve later problems. While school systems are required to provide a procedural safeguard notice to parents of children with disabilities, they are not required to inform them of their upstream optional dispute resolution opportunities. If formal procedures are not an attractive option for Elena, access to early and innovative processes to resolve disagreements before they evolve onto full-scale conflicts are essential to keeping working relationships intact and focusing on the child's educational needs.

The 21st century's heavy demands on education systems — and on those responsible for managing them — require new ways of thinking and new



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methods for resolving the disputes that inevitably arise in environments facing such stress. The contours of special education dispute resolution are changing and helping to meet these challenges, offering policy makers, school officials, parents, and all other stakeholders new ways to address conflict early and effectively. What we also need is continued bold leadership and a deeper understanding that we are all better off when we work, imagine, and create together — and hold dignity high. ■

Endnotes

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

2 "37th Annual Report to Congress on the Implementation of the *Individuals with Disabilities Education Act, 2015*," Office of Special Education and Rehabilitative Services, US Department of Education (December 2015).

3 Public Law 108-446, Part A, Section 601 (c)(1).

4 Public Law 108-446, Part A, Section 601 (c)(8).

5 Federal Register Volume 71, Number 156, page 46748 (Monday, August 14, 2006).

6 See Ed Feinberg, Jonathan Beyer & Philip Moses, *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education* (Consortium for Appropriate Dispute Resolution in Special Education ed., 2002).

7 See Ed Feinberg, Jonathan Beyer & Philip Moses, *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education* (Consortium for Appropriate Dispute Resolution in Special Education ed., 2002).

8 See Philip Moses & Timothy Hedeem, *Collaborating for our Children's Future: Mediation of Special Education Disputes*, ABA dispute Resolution Magazine (Summer 2012); Also Ed Feinberg, Jonathan Beyer & Philip Moses, *Beyond Mediation: Strategies for Appropriate Early Dispute Resolution in Special Education* (Consortium for Appropriate Dispute Resolution in Special Education ed., 2002).

9 CADRE avoids the phrase "best practices" — after all, is there ever really a "best" approach? Even if a "best practice" for designing a statewide system could be identified someplace, differences in states' population size, scope of conflict, and cultural imperatives would require a different blueprint elsewhere. What works in New Jersey, CADRE officials realize, may not work so well in Hawaii.

10 See *Fundamental Attributes of Exemplary State Special Education Dispute Resolution Systems*, Center for Appropriate Dispute Resolution in Special Education (April 2013).