Special Education Mediation: Musings of a Hopeful Peacemaker

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Author's Statement of Purpose

In 2019, after more than 20 years of advocating for students with special needs, first as a public school teacher and then as a special education attorney, I began a new professional journey as a full time Peacemaker. While I am still a licensed attorney, I no longer represent parties in adversarial proceedings. Instead, I work full-time as a professional Mediator, helping parents and school districts resolve special education conflicts peacefully, creatively, efficiently, and constructively. I hope that my experience and perspective will inspire parents, advocates, attorneys, and professionals on all sides of these conflicts to engage in Mediation more often and more successfully.

The Educational and Legal Context of Special Education Disputes

Many people are surprised to learn that education is not a fundamental right in the United States. The word appears nowhere in the United States Constitution and the Supreme Court has never found it hiding between the lines of any Article or Amendment. Whatever *general* educational rights exist in this country come from state constitutions and state laws, all of which are subject to the whims and wishes of the voters and legislatures in each state. If the people of Massachusetts or Pennsylvania, or any other state, no longer wished to have a public education system, they would be free to vote it out of existence. Similarly, all rights to *special* education in the United States come from a small number of state and federal laws that are even more vulnerable to the shifting winds of politics, funding, and public policy. Thus, while *all* children in the United States presently have a legal right to at least some public education. *nobody* is legally entitled to *special* education *except* for those students who are deemed eligible for them under these laws.

This is the context in which special education conflicts occur today: In the past, most children had few educational rights, while some had none; today, most children still have few educational rights, while some have a lot. This history – this reality – stands in stark contrast to what is in our hearts our values as parents and educators. We *feel* and *believe* that all children are entitled to an education, to achieve their potential, and that our laws protect everyone equally. Our history and our laws tell a different story. Our hearts scream, "all students have rights!" while our laws whisper: "Only if they are eligible."

"Fault Lines" in the IDEA

When we examine how our laws attempt to define eligibility and apportion special education services, we can see why these conflicts are so contentious, complex, and

uncertain for the parties. Simply put, a student's legal right to special education services (if any) from their LEA depends entirely on the meaning of a few inherently vague and imprecise words, such as "appropriate," "reasonable," "meaningful," "significant," "satisfactorily," and "marked degree." These words create "fault lines" of uncertainty that destabilize the relationships between parents and LEAs and trigger explosive conflicts over crucial but limited financial and human resources for very vulnerable students.

Here are some of the most volatile "fault lines" in the IDEA, out of which most special education conflicts erupt. In each example, the major "fault lines" appear in **bold**.

1. The Definition of "Specially Designed Instruction." To be eligible for the rights and protections of the IDEA, one must be a "child with a disability," as defined by the statute. Under IDEA, a "child with a disability" is a child who is determined to have one of the disabilities listed in 34 C.F.R. 300.8(a) and, "who by reason thereof, needs special education and related services. The term, "special education," in turn, is defined as "specially designed instruction," which is yet another defined term, and which means:

> Adapting, as **appropriate** to the needs of an eligible child, the content, methodology, or delivery of instruction to address the **unique needs** that result from the child's disability; and [t]o ensure access to the general curriculum, so that the child can meet the State's general educational standards.[1]

2. The definition of "FAPE." The essential "right" that the IDEA bestows upon eligible students is the right to a "Free **appropriate** public education" (FAPE). The statute defines FAPE as:

> [S]pecial education and related services that (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an **appropriate** preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP)[.][2]

Decades of litigation at every level of our state and federal courts, up to and including the United States Supreme Court, has failed to offer parents and LEAs any clarity on the meaning of this all-important term. Indeed, when the Court issued its landmark *Endrew F.* decision 2017, we learned only that FAPE means that

1 34 C.F.R. 300.39(b)(3)
2 34 C.F.R. 300.17

student's IEP must be "**reasonably** calculated to enable a child to make progress **appropriate** in light of the child's circumstances" and that this progress must not be "***de minimis***."[3]

3. The definition of "Least Restrictive Environment." Along with the right to a FAPE, the other cornerstone of the IDEA is the student's right to receive a FAPE in "the least restrictive environment" (LRE). To meet the LRE requirement, LEAs must ensure that:

> To the maximum extent **appropriate**, children with disabilities are educated with children who are nondisabled; and Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved **satisfactorily**.[4]

4. The definition of "Emotional Disturbance." One of the 13 "categories" of disability in the first prong of the definition of "child with a disability" is also one of the most contentious flashpoints in the IDEA. To be eligible under the "emotional disturbance" category, a student must have:

> A condition exhibiting one or more of the following characteristics over a **long period of time** and to a **marked degree** that adversely affects a child's educational performance: An inability to learn that cannot be explained by intellectual, sensory, or health factors; An inability to build or maintain **satisfactory** interpersonal relationships with peers and teachers; **Inappropriate** types of behavior or feelings under **normal** circumstances; A general pervasive mood of unhappiness or depression; A tendency to develop physical symptoms or fears associated with personal or school problems.[5]

The definition also states that "The term does not apply to children who are **socially maladjusted**, unless it is determined that they have an emotional disturbance," yet the statute provides no definition of the term "socially maladjusted."[6]

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3 *Endrew F. v. Douglas County School Dist*. RE–1, 580 U.S. ___ (2017). For an examination on the impact of *Endrew F*. on special education mediation, *see* Grant Simon, "Hardly Be Said to Offer an Education at All: Endrew and Its Impact of Special Education Mediation," *2018 J. Disp. Resol*. 133 (2018).

4 34 CFR 300.114(a)(2)

5 34 CFR 300.8(c)(4)(i)

6 34 CFR 300.8(c)(4)(ii)

5. The IDEA's fee shifting provision. Under the IDEA, a court may award "**reasonable** attorneys' fees" to the "**prevailing** party" of a due process hearing.[7] It is difficult to overstate the magnitude of these "fault lines" and their role in triggering explosive conflict between parents and LEAs. The statute does not define "reasonable" or "prevailing," leaving that work entirely to the parties and our federal courts.

Looking back on my 15 years of experience both as a special education attorney and special education mediator, I cannot think of a single conflict I witnessed between parents and LEAs that did not arise from at least one of these 5 "fault lines." Indeed, the most common types of special education conflicts are about a handful of issues, in particular eligibility, programming, and placement:

Eligibility*: Are they qualified for an IEP?*

- Do they fit into one of the 14 IDEA boxes?
- Do they require SDI as a result?
- IEP vs. 504
- Evaluation Disputes (IEE?)

Program: *Is their IEP "appropriate"?*

- SDI and Related Services
- Goals
- Progress
- Evaluation Disputes (IEE?)

Placement: *Where should they go to school?*

- Continuum of placements (LRE)
    - Regular classroom (with or without aide)
    - Special classroom (part-time, full-time)
    - Approved Private School
    - Out of District
    - Residential
    - Home

It's not a coincidence that these are such common disputes. Eligibility, Program, and Placement are the three pillars of the FAPE, and they all stand squarely on top of the biggest "fault" lines at the heart of the IDEA. These "fault lines" are the cracks in the law that create opportunities for blame, equivocation, and conflict. And because their meaning is

7 34 CFR 300.517

the key to unlocking closely guarded rights and benefits for vulnerable children and young adults, the disputes they engender are explosive.

Special education conflicts are powder kegs, a volatile mixture of:

- Subjective/Vague legal standards
- High stakes
- Vulnerable children, frightened parents
- Scarce human and financial resources
- High emotions
- High stress
- High cost
- Information & power imbalance

The most common emotions I have witnessed in these disputes are:

- Fear
- Anger
- Mistrust
- Frustration
- Confusion/Doubt
- Sadness/Grief
- Disappointment
- Betrayal
- Isolation
- Hopelessness / Helplessness

When the allocation of scarce resources turns on the definitions of vague terms, emotions run high and trust between the parties is low. Uncertainty invites equivocation, which erodes confidence and perceptions of honesty and integrity. Competition for resources fosters adversarial, zero-sum (positional) thinking, and strategic gamesmanship by parents and LEAs alike. Each side stands on either side of the fault-line ("reasonable!" "unreasonable!" "appropriate!" "inappropriate!") as if tugging on an invisible rope stretched across the legal divide.

Special Education Dispute Resolution Alternatives

When conflicts arise, the IDEA offers parents and LEAs a variety of dispute resolution options, including IEP meetings,[8] mediation,[9] resolution meetings,[10] due process

8 *See* 34 CFR 300.324, *et seq.*
9 *See* 34 CFR 300.506, *et seq.*
10 *See* 34 CFR 300.510, *et seq.*

hearings,[11] and a right to appeal to federal court after exhausting administrative remedies.[12] Some SEAs – including Pennsylvania, where I practiced as a special education attorney, and continue to practice as a mediator, offer other informal dispute resolution processes, including: IEP Meeting Facilitation,[13] Hearing Officer Settlement Conferences,[14] and Evaluative Conciliation Conferences.[15] Each of these processes offers parents and LEAs the opportunity to resolve their conflict without litigation, and many would-be litigants have benefited from them.

When I represented parents in special education matters in Pennsylvania, I participated in all the above-mentioned processes at least once, with the exception (ironically!) of mediation.[16] While it would be beyond the scope of this Paper for me to describe, compare, and evaluate all the different dispute resolution alternatives, I commend Pennsylvania for offering parents and LEAs so many alternatives to litigation, and I encourage other SEAs to do the same. While there are pros and cons to every process, every conflict is unique, and the parties (and their attorneys) certainly benefit from having a variety of options to choose from when trying to avoid litigation.

The Perils of Litigating Special Education Disputes

While the IDEA does not explicitly *encourage* parents and LEAs to litigate their disputes, there are features of the law that place them on a path in that direction. The IDEA offers parents robust "procedural safeguards"[17] that are meant to protect their rights to "procedural due process." As in many other legal contexts, "procedural due process" under the IDEA includes the rights to "prior written notice"[18] and an opportunity to be heard before the state (in this case, the LEA) reduces or changes the benefits it is providing the parents under a federal law.[19] Procedural due process under the IDEA also ensures that the student's current placement stays in place pending the outcome of a due process hearing or appeal.[20] Finally, if parents wish to bring claims against the LEA for violations of their rights under IDEA, they must do so within the applicable statute of limitations, which can

11 *See* 34 CFR 300.511, *et seq.*
12 *See* 34 CFR 300.532, *et seq.*
13 *See* https://odr-pa.org/facilitation/
14 *See* https://odr-pa.org/due-process/hearing-officer-settlement-conference/
15 *See* https://www.cadreworks.org/cadre-continuum/stage-iii-conflict/third-party-opinionconsultation/evaluative-conciliation
16 In the years I was practicing special education law as an attorney in Pennsylvania (2006-2019), attorneys were not allowed to participate in ODR mediations. ODR changed that practice in 2021. *See* https://odr-pa.org/wp-content/uploads/medguide.pdf. For an interesting discussion of the role of attorneys in special education mediation, *see* Zankich, Morgan N. "Mediation in special education law: the necessity for attorney representation." *Dispute Resolution Journal* 70.3 (2015): 141.
17 *See* 34 CFR 300.421, *et seq.*
18 *See* 34 CFR 300.420, *et seq.*
19 *See* 34 CFR 300.411-413, et seq.; 34 CFR 300.432-447, *et seq*.
20 *See* 34 CFR 300.518, et seq. (the "stay put" or "pendency" provision).

only be "tolled" by filing of Complaint.[21] In short, if the IDEA provides parents and LEAs with a roadmap for dispute resolution, it is fair to say that the widest, most well-paved and clearly marked highway on that map is the road to a Due Process Hearing.

In practice, Due Process Hearings are a lot like courtroom trials, complete with a court reporter, witness testimony, a presiding adjudicator, attorneys, and often voluminous documentary evidence/exhibits. While some hearings are completed in a single day, many require multiple sessions, spanning many days or even weeks or months, depending on the complexity of the case and the participants' schedules. Hearing Officers rule on objections, question witnesses, make credibility and other factual determinations, hear and read evidence, write detailed opinions/decisions applying the facts to the law in each case, and – in some cases – award remedies to one or both parties. These decisions are appealable to federal court, under a modified *de novo* standard of review, but federal courts will only hear these cases after the parties have "exhausted their administrative remedies," (*i.e.*, a due process hearing).[22]

While the "F" in FAPE means "Free," the reality is that due process comes at a very high cost to many (perhaps most?) parents and LEAs. Adversarial proceedings, including Due Process Hearings, are rarely described in positive terms by those who experience them as litigants, witnesses, and attorneys. When I reflect on my own experiences, and ask others about theirs, I am much more likely to hear the adversarial process described as: expensive, risky, uncertain, tedious, inefficient, ineffective, damaging, frustrating, bewildering, mystifying, and even traumatic. I believe that most parents and LEAs – and their attorneys – would agree on one thing: *there must be a better way to resolve these conflicts*.

Mediation: A better way to resolve (many) special education conflicts.

Mediation can be a very powerful and effective process for resolving many special education disputes because the process itself is almost tailor-made for these types of conflicts.[23] Before I explain why I believe this, I need to clarify what I mean by mediation, because there is more than one "type" and I do *not* believe that all of them are equally well-suited for special education conflicts.[24] Specifically, the type of mediation I practice – and which I believe *is* useful in these cases – is *facilitative* mediation. In facilitative mediation, the mediator's role is to *facilitate* communication between the parties, from a neutral position, to help them create their own solutions to their conflict. This approach differs

21 *See G.L. v. Ligonier Valley Sch. Dist. Auth*., 802 F.3d 601 (3d Cir. 2015)
22 *See Fry v. Napoleon Community Schools*, 580 U.S. ___ (2017).
23 For an excellent overview of the history and role of mediation in special education disputes, *see* Sonja Kerr & Jenai St. Hill, "Mediation of Special Education Disputes in Pennsylvania," 15 *U. Pa. J.L. & Soc. Change* 179 (2011-2012); *see also*, Katherine McMurtrey, "The IDEA and the Use of Mediation and Collaborative Dispute Resolution in Due Process Disputes" 2016 *J. Disp. Resol*. 187 (2016).
24 Zumeta, Z., "Styles of mediation: Facilitative, evaluative, and transformative mediation," National Association for Community Mediation Newsletter, 5 (2000).

significantly from *evaluative* mediation, in which the mediator offers her/his opinion on the facts and proposes solutions to the parties. Evaluative mediators *evaluate* the conflict, share their opinions, and often act as brokers between the parties, shuttling back and forth trying to get them to strike a deal. In my view, facilitative mediation is more party-centric, while evaluative mediation is more mediator-centric. I believe that mediation works better in special education matters when the *parties* are at the helm.[25]

In addition to being facilitative in my mediation style, my approach to mediation is heavily informed by my training in interest-based negotiation and mediation at Harvard Law School's Program on Negotiation,[26] the fundamentals of which are set forth in their groundbreaking, international bestselling book, *Getting to Yes*.[27] The core principles of interest-based negotiation and mediation are that parties achieve the best agreements (ones that maximize value for all) when: (1) they search for win-win solutions that meet all of their underlying interests, rather than engage in zero-sum (what you gain, I lose, and vice versa) positional bargaining; and (2) they understand winning as achieving an outcome that is better than the best alternatives.

In my experience, facilitative mediation that fosters interest-based negotiation works well in these cases because it helps the parties span the fault-lines of the IDEA.[28] It achieves this by:

- Focusing the parties on clarifying their (and each other's) interests, instead of on equivocation over inherently vague words and terms;
- Eliminating all uncertainty in the outcome;
- Imposing virtually no limits on what can be in the parties' agreement;
- Offering a confidential forum in which parties can speak freely without fear of their statements being used against them in subsequent litigation;
- Fostering communication and mutual trust that strengthens ongoing relationships between the parties;
- Helping the parties understand the practical and realistic alternatives to resolving their conflict on their own (i.e., the risks of turning the dispute over to a judge or hearing officer);

25 Mediation may be even more effective when the parties engage in it earlier in their conflict. *See* de León, V., de León, M. and Valle, F. (2021) "Policy-to-Practice—A Portraiture Study of Special Education Implementations to Improve Student Outcomes through Mediation." *Creative Education*, 12, 1608-1614.

26 https://www.pon.harvard.edu/

27 Fisher, Roger, William Ury, and Bruce Patton, "Getting to Yes: Negotiating Agreement Without Giving In," 3rd ed., rev. ed. New York: Penguin, 2011.

28 For another mediator's perspective on special education mediation, *see* Jan Marie Fritz, "Improving special education mediation," *International Review of Sociology*, 18:3, 469-480 (2008).

- Allowing the parties to reach interim or partial agreements that improve their situations and pave the way for more complete, longer term resolutions.

This type of mediation helps parties build and restore the bridges that would be (or have been) burned in adversarial litigation.[29] When parents and LEAs engage in this process, with the help of a skilled mediator, they can discover many shared interests that were previously/otherwise invisible, and they can create agreements that meet all of them. Here are some interests that parents and LEAs have brainstormed in mediation. Note the common grounds they share:

Parents	LEAs
Child's education	Child's education
Child's safety	Child's safety
Harmony at home	Needs of staff
Family financial security	Needs of other students
Respect	Budget/Financial
Relationship with school	Precedent
Fairness	Legal compliance
	Relationship with Child/Parents
	Respect

To meet these interests, parents and LEAs can explore a wide-range of short and long term options and alternatives, many of which are unavailable to them in a Due Process Hearing, where hearing officers are often limited to a handful of remedies (*e.g.,* compensatory education and tuition reimbursement). Here is a list of some of the options I have seen parties explore and agree to during mediation:

- Changes to IEP
- Reevaluation (by LEA or IEE)
- Change of placement
- Compensatory education fund
- Hiring outside consultant to advise IEP Team
- Parent-LEA communication plan
- Tolling agreement
- In-lieu-of-FAPE agreement (private school placement)
- Waiver/Release
- Confidentiality
- Apology

29 Nowell BL, Salem DA, "The Impact of Special Education Mediation on Parent—School Relationships: Parents' Perspective." *Remedial and Special Education*. 2007;28(5):304-315.

- Meeting Facilitation
- Interim Agreement

Conclusion:

To understand why Mediation is so well-suited to helping parents and LEAs to resolve their special education conflicts, we need to first consider the context in which most of these disputes occur. Special education disputes do not occur in a vacuum. They occur at the intersection of complex educational and legal systems that were designed to allocate vital services and limited human and financial resources based on imprecisely constructed categories and classifications of students. It's a messy business. Whenever access to crucial rights and benefits turns on membership in a class, group, or category, the words and terms that define them become epicenters of conflict. Similarly, when the building blocks of the rules and regulations that implement, govern, and enforce these systems are subjective and imprecise, it creates unstable "fault lines" upon which explosive conflicts occur. In short, at the heart of most special education conflicts lurks inherently imprecise and words, terms, concepts, or subjective standards that require interpretation under unique, disputed, and often complex circumstances. Whenever the parties rely on a hearing officer or a judge to resolve such conflicts, they face great uncertainty and risk, and often enormous expense and delay. When they Mediate, however, the parties retain control over the outcome and save time and resources by directing their efforts toward the clarification of their interests, not of inherently vague words, terms, and standards.