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THE NEW RESOLUTION MEETING -- IDEA'04

PRESENTED AT

ON THE ROAD TO AGREEMENT:
THE FOURTH NATIONAL SYMPOSIUM ON DISPUTE RESOLUTION
IN SPECIAL EDUCATION
WASHINGTON, D.C. DECEMBER 8, 2006

I. *Introduction: The New Resolution Meeting*

A. Statutory Requirements

A brand new mandatory resolution meeting is added to the special education dispute resolution process by IDEA'04. Section 615 (f)(1)(B). Within 15 days of receipt of a due process hearing complaint from the parents, the school district (hereafter

sometimes referred to as "LEA") must convene a meeting with the parents, a representative of the LEA with "decision making authority," and relevant member(s) of the IEP team who have "specific knowledge of the facts identified in the complaint." The purpose of the resolution meeting is to permit the parents to discuss their complaint and the underlying facts and to provide the LEA the opportunity to resolve the complaint. The LEA may not bring their lawyer unless the parent has a lawyer. The parties may avoid the resolution meeting only by waiving the meeting in writing or by participating in mediation instead. Section 615(f)(1)(B)(i). If the LEA has not resolved the complaint to the satisfaction of the parents within 30 days after receipt of the complaint, the hearing may occur and "all applicable timelines for a due process hearing" shall commence. Section 615(f)(1)(B)(ii). If the resolution session process results in a written settlement agreement, the agreement is legally binding and enforceable in court, except that if either party suffers from "buyer's remorse," he may void the agreement within three business days after it is executed. Section 615(f)(1)(B)(iii) and (iv).

Attorneys who represent parents are barred from seeking attorney's fees and costs for participation in the resolution meeting if they choose to attend. Section 615 (i)(3)(D)(ii)and(iii).

A portion of the conference committee report that discusses the resolution session states that these changes address "unscrupulous lawyers and an overly complex system" that has "led to an abundance of costly and unnecessary lawsuits." The conference report goes on to explain that the resolution meeting process is needed because "...(t)oo often, schools are unaware of parental complaints and concerns until an official complaint is filed and the legal process is already underway." H.R. 1350 Conference Report, (November 17, 2004).

B. Federal Regulations (effective 10/13/06)

The regulations require that the parent and the LEA determine which "relevant members" of the IEP Team attend the resolution meeting. 34 C.F.R. Section 300.510(a)(4).

Concerning the timeline for the hearing officer decision, the regulations provide that the 45 day period begins after the expiration of the 30 day resolution period, with the following three exceptions in which the 45 day period begins the day after any one of the following events: 1) both parties agree in writing to waive the resolution period; 2) after beginning mediation or the resolution meeting, both parties agree in writing that no agreement is possible; and 3) both parties agree in writing to continue mediation at the end of the 30 day period, but later, either party withdraws from the mediation process. 34 C.F.R. Section 300.510(b)(2) and (c).

Where a parent fails to participate in the resolution meeting, the timelines for the resolution process and the due process hearing are delayed. 34 C.F.R. Section 300.510(b)(3). If the LEA is unable to obtain the participation of the parent after reasonable efforts (documented in the same manner as IEP Team meeting participation), the LEA may, at the conclusion of the 30 day resolution period, request that the hearing officer dismiss the due process complaint. 34 C.F.R. Section 300.510(b)(4).

Where the LEA fails to convene the resolution meeting within 15 days of receipt of a parent's due process complaint, or where the LEA fails to participate in the resolution meeting, the parent may request the hearing officer to intervene and begin the due process decision timeline. 34 C.F.R. Section 300.510(b)(5).

In the event that the resolution process produces a written agreement, the regulations add that in addition to enforcing the agreement in a court, the parties may enforce the agreement through the SEA in the event that the State has adopted other

mechanisms or procedures for such enforcement. 34 C.F.R. Section 300.510(d)(2).

In disciplinary cases requiring an expedited hearing, the deadline for the resolution meeting to be held is reduced to seven days from receipt of the complaint and the resolution period is shortened to 15 days from receipt of the complaint. 34 C.F.R. Section 300.532(c)(3)(i) and (ii).

II. Potential Problems

The idea underlying the new resolution session is to provide an informal and non-adversary but mandatory meeting to try to settle a special education dispute before a long and costly due process hearing. Unfortunately, by the time they get to the point where a due process hearing complaint is filed, the parties are often at a highly elevated emotional level. It seems inevitable that the resolution process will sometimes aggravate rather than reduce the parties' emotions. The discussion below considers some of the more serious potential problems likely to be associated with the resolution meeting process.

A. Confidentiality

A major issue that is likely to arise involves the admissibility of discussions at the resolution meeting in a subsequent due process hearing or court proceeding. Unlike the mediation section of the Act, which contains a specific guarantee of confidentiality for any discussions during a mediation session, see Section 615 (e)(2)(G), there is no specified confidentiality protection for

discussions that take place during a resolution meeting. I predict that many due process hearings will now involve objections to testimony concerning what was said at a resolution meeting. Parties wanting to offer the testimony will likely argue that we must assume that Congress knows what it is doing and that Congress specifically restricted the admissibility of discussions only in the context of mediation. Those wanting to exclude the testimony will probably argue that this was an oversight by Congress and that any settlement talks should be protected. Many states restrict the admissibility of settlement discussions as a matter of law or court decision to promote the policy of encouraging settlement, although questions could also arise concerning whether the Supremacy Clause of the constitution mandates a different result.

Unfortunately, the analysis of comments accompanying the new regulations does not provide any help. OSEP specifically rejected the request of several commenters to clarify whether discussions at resolution meetings are confidential because the Act is silent regarding confidentiality. 71 Federal Register No. 156 at page 46704 (8/14/06). OSEP went on to say that although the parties could negotiate a confidentiality agreement as a part of their written resolution agreement, a state **could not** require the parties to a resolution meeting to keep the discussions confidential. 71 Federal Register No. 156 at page 46704 (8/14/06)(emphasis not in original). Unfortunately, the problem is not likely to arise in situations where the resolution process results in an agreement. It is where the parties do not agree that the danger lies. After an unsuccessful resolution meeting, the danger exists that a party may offer testimony at a subsequent due process hearing concerning discussions, or even misunderstandings of discussions, that took place at a resolution meeting. The analysis by OSEP would seem to support the argument that discussions at resolution meetings generally **are** admissible in subsequent due process proceedings. The danger is that if discussions are not confidential, there is likely to be a chilling effect upon the parties' willingness to speak freely, thus resolution.

Although it is still very early in the process of administrative and judicial interpretation of the resolution session provisions, the preliminary hearing officer decisions seem to be admitting testimony at due process hearings concerning resolution meeting discussions although no decision has squarely addressed the issue of confidentiality. For example, in Dept. of Educ, State of Hawaii 106 LRP 47985 (SEA-HI 3/17/6), the hearing officer admitted testimony concerning whether the "little yellow bus" was discussed at a resolution meeting. The hearing officer accepted the testimony of the parent that the transportation option was not offered at the resolution meeting and held that the district denied FAPE by failing to provide the related service of transportation to meet the student's needs. In the case of In Re: Foxborough Regional Charter School 106 LRP 34379 (SEA Mass. 5/30/6), the parent testified that the first time that extended school year services were discussed was at the resolution meeting. The hearing officer ruled for the parent and ordered ESY services and two IEEs.

The written minutes of a resolution session were admitted into evidence as an exhibit in Mississippi Dept. of Educ. 106 LRP 39916 (SEA Miss. 1/31/6). The minutes were apparently not relied upon to support any finding of fact, but they were attached to the decision as an appendix. The issue in Compton Unified Sch. Dist. 106 LRP 31114 (SEA Calif. 1/31/6) was whether the parent had made requests for the student's educational records. The hearing officer relied upon testimony from the parent's advocate that the request for records was repeated at the resolution meeting in finding for the parent.

Whether the parent had provided notice of rejection of the district's placement was the issue in a unilateral placement reimbursement case in Mullica Township Bd of Educ 106 LRP 4792 (SEA NJ 11/9/5). The hearing officer admitted testimony concerning rejection of the district's placement by the parents at the resolution meeting and ruled for the parents. In Prince George's County Pub Sch 106 LRP 31511 (SEA MD 2/2/6), the hearing officer found a violation of the Act and was contemplating

an award of compensatory education. The district argued that because the notice of due process hearing mentioned only reimbursement as requested relief, the hearing officer could not award compensatory services. The hearing officer concluded that the district was on notice that the compensatory services were being sought because the parents testified at hearing that compensatory education was discussed at the resolution meeting. (Like the other cases in this section, there is no mention of any objection to testimony as to discussion at resolution sessions.)

It is likely that future decisions will more squarely address the issue of whether discussions during a resolution meeting are admissible in a subsequent due process hearing. Until then, parties to due process proceedings should proceed with extreme caution and assume that resolution meeting discussions are likely not confidential.

B. Participation by Parent

The federal regulations provide that where a parent does not participate in the resolution meeting, the timelines for both the resolution process and the hearing will be delayed. 34 C.F.R. Section 300.510(b)(3). To avoid the potential perpetual stay-put problem caused by the proposed regulations, the final federal regulations add a provision that if the LEA is unable to obtain the participation of the parent after reasonable efforts (which now must be documented in the same manner as IEP Team meeting participation), the LEA may, at the conclusion of the 30 day period, request that the hearing officer dismiss the due process complaint. 34 C.F.R. Section 300.510(b)(4).

In the analysis of comments section of the new regulations, OSEP declined to provide guidance as to the level of participation that is required. OSEP noted that if a parent fails to participate in the resolution process, the LEA would need to continue to make diligent efforts to convince the parent to participate throughout

the remainder of the 30-day resolution period. 71 Federal Register No. 156 at page 46702 (8/14/06). OSEP agreed with commenters who requested a regulation requiring efforts to convince the parent to participate be documented in the same manner as efforts to obtain participation of a parent in the IEP Team meeting process, and, accordingly, it adopted Section 300.510(b)(4). 71 Federal Register No. 156 at page 46703 (8/14/06).

The participation provision could cause numerous headaches for the special education community. What level of participation is required? Are parents required just to show up, or are they required to bargain in good faith, or is the standard somewhere in between? The decision to provide no guidance on the level of participation likely will create another new battleground for litigation.

Another issue concerns what happens when there is a dispute as to whether the parent "participated." Will it be necessary to convene preliminary mini-hearings to resolve factual disputes concerning issues of parent participation? A hearing officer is unlikely to resolve contested factual issues without some kind of an evidentiary hearing. Because evidentiary hearings will be needed, the idea of reducing "costly and unnecessary lawsuits" by using the resolution process will likely be thwarted.

As with other resolution meeting issues, there are only a few decisions involving alleging failure by the parent to participate in the resolution meeting. In Sch Dist of Philadelphia 106 LRP 53542 (SEA PA 8/22/6), a state review panel refused to consider the issue of whether the parents alleged failure to participate should have delayed the hearing because it was raised improperly on an interlocutory appeal. The panel invited the parties to raise the issues again if they file exceptions after the hearing officer issues a decision.

A hearing officer did issue an order delaying the due process and resolution session timelines in Weiner Sch Dist 106 LRP

29396 (SEA Ark. 2/27/6). Because the parents or their attorney could not attend the scheduled resolution meeting, the hearing officer delayed the timelines and warned that if the resolution session did not occur by a date certain, the due process complaint would be dismissed. (The parents did then participate, but no agreement was reached and an eight day due process hearing ensued.) Where a parent failed to participate in the resolution meeting and otherwise failed to prosecute his due process complaint, a hearing officer dismissed the complaint in Chesterfield County Sch Dist 106 LRP 49379 (SEA SC 12/21/5).

C. Buyer's Remorse/ Right to Void Agreement

Interestingly the "buyer's remorse" provision, Section 615(f)(1)(B)(iii) and (iv), that gives the parties three business days to void a settlement agreement resulting from a resolution session, has no counterpart in the section concerning mediation. A party who has voided, or attempted to void, a mediation agreement within three days after it is signed may try calling it a "resolution session agreement." More disturbing is the possibility that parties could appear to negotiate an agreement in good faith, only to have one side invoke the buyer's remorse clause because of hostility toward the opposing party. This would likely cause even further damage to the parties' already strained relationship.

OSEP refused to enact a regulation requested by commenters that would require parents to be notified orally and in writing that either party has the right to void a resolution agreement within three business days. 71 Federal Register No. 156 at page 46703-04 (8/14/06). Because of the existing requirement that parents be provided written notice of their procedural safeguards in general, OSEP felt that such additional notice would be overly burdensome. 71 Federal Register No. 156 at page 46704 (8/14/06).

In New York City Dept of Educ 106 LRP 39990 (SEA NY 6/21/6), a resolution meeting was held on Wednesday December 7th, and the parties entered into a settlement agreement. On December 12th, the parent sent the district a letter voiding the agreement. Because the letter was mailed within three business days of the agreement, the state review officer held that the settlement agreement was properly invalidated within the buyer's remorse period and the matter could proceed to hearing.

A state review officer ducked the issue of whether under the IDEA a parent has the right to receive separate notice of the right to revoke a resolution agreement in Richland Sch. Dist. Two 106 LRP 49389 (SEA SC 3/29/6). The state review officer noted that if the parents ever reenroll the student in the district that the hearing officer should rule on the issue.

See also, the discussion of Mr & Mrs S ex rel BS v. Rochester Community Schs 106 LRP 58719 (W.D. Mich. 10/2/6) in the following section on the role of attorneys for an additional example of a revocation of a resolution agreement.

D. Role of Attorneys

The restrictions on the ability of lawyers to be present at the resolution meeting are highly likely to cause problems. Attorneys are generally very uncomfortable when clients that they represent sit down with the opposing party to hammer out a settlement in the absence of the attorney. As a result, some lawyers may advise their clients to remain tight-lipped during the resolution meeting.

Also, where an attorney knows that the other party is represented by counsel, the cannons of ethics prohibit direct communication between the lawyer and a represented party concerning the substance of the dispute. See eg. Rule 4.2, West Virginia Rules of Professional Conduct. A question could arise concerning whether similar ethical restrictions might apply by

analogy to a lawyer permitting his client to communicate with the represented opposing party concerning the substance of the dispute. The ban on lawyers may also infringe upon the right to counsel.

OSEP declined the request of some commenters who wanted the parents to be required to notify the school district in advance as to whether the parents would be bringing a lawyer to the resolution meeting. 71 Federal Register No. 156 at page 46701 (8/14/06). OSEP also opined that because an advocate for a parent/child may be a member of an IEP Team, it was unnecessary to provide in the regulations that an advocate may attend the resolution meeting. 71 Federal Register No. 156 at page 46700-01 (8/14/06).

The issue of the presence of the school district lawyer was presented in Mr & Mrs S ex rel BS v. Rochester Community Schs 106 LRP 58719 (W.D. Mich. 10/2/6). The parents were dissatisfied with the district evaluation and requested an IEE at public expense. The district felt that its evaluation was appropriate and filed a due process complaint. A resolution meeting was scheduled and the district's attorney arrived before the meeting to review documents and to train school personnel for the resolution meeting. The attorney left before the meeting began. After two hours, the parties reached an initial agreement. The district personnel brought the agreement down the hall to their lawyer who retyped it adding legal language. After subsequent revisions, the parties signed the agreement. The parents then faxed the agreement to their lawyer who advised them that the agreement gave up their right to an IEE. Upon learning what the agreement meant, the parents rescinded the agreement immediately.

The parents then filed a state complaint, and the SEA found a violation of the IDEA issuing a corrective order requiring district personnel to notify all resolution process participants if a parent does not have an attorney present, an LEA may not have an attorney participate in the resolution process from the beginning until the end. The court reversed holding that there is a

distinction between the resolution meeting and the agreement creation period. The court held that the ban on LEA lawyers, and the restriction on fees for parent attorneys, applies only to the resolution meeting itself and not to the agreement drafting period. The court noted that the LEA attorney may not be physically present or listen in over the telephone or confer with participants during the resolution meeting only. The Court also noted that the participation of the lawyer should apply only to the conversion of the substantive agreement to a legally enforceable agreement. The Court declined to review the alleged ethical violations by the district's lawyer because the state Attorney Grievance Committee was the proper forum for such complaints. Mr & Mrs S ex rel BS v. Rochester Community Schs 106 LRP 58719 (W.D. Mich. 10/2/6).

In Melrose Pub Schs 46 IDELR 119 (SEA Mass. 5/26/6), the hearing officer denied the parent's motion to exclude the Special Education Administrator for the school district from the resolution meeting because she happens to be an attorney. Where the administrator had never represented the district and she had previously been a member of the student's IEP Team, she was permitted to attend the resolution meeting.

E. Relevant Team Members

The IDEA requires that the parents and the "relevant member or members of the IEP team who have specific knowledge of the facts identified in the complaint" must attend the resolution meeting. Section 615(f)(1)(B)(i). The federal regulations provide that the parents and the LEA determine which team members attend the resolution session. 34 C.F.R. Section 300.510(a)(4). Thus, it seems that either party can designate team members who must then attend the resolution meeting. In addition to disputes as to who has knowledge, this system invites additional problems with notice and scheduling.

OSEP has urged parties to act cooperatively in naming the relevant IEP Team members who will attend because "…a resolution meeting is unlikely to result in any resolution of the dispute if the parties cannot even agree on who should attend." 71 Federal Register No. 156 at page 46701 (8/14/06). However, OSEP clarified that either party may designate any IEP Team member as a participant in the resolution meeting. 71 Federal Register No. 156 at page 46700-01 (8/14/06).

See, the discussion of Melrose Pub Schs 46 IDELR 119 (SEA Mass. 5/26/6) in the previous section on the role of attorneys, approving of the attendance of a special education administrator who happens to be a lawyer.

F. Timelines (Deadline for Decision)

The new federal regulations retain the general rule set forth in the proposed regulations that the 45 day deadline for the hearing officer's decision begins after the thirty day resolution period ends. 34 C.F.R. Section 300.510(b)(2). Unlike the proposed regulations, however, the new regulations provide the following three exceptions in which the 45 day period begins the day after one of the following events: 1) the parties agree in writing to waive the resolution period; 2) after beginning mediation or the resolution meeting, the parties agree in writing that no agreement is possible; and 3) the parties agree in writing to continue mediation at the end of the 30 day period, but later, either party withdraws from the mediation process. 34 C.F.R. Section 300.510(c).

OSEP adopted the exceptions to the decision deadline timelines because of the concerns of commenters that it was not appropriate to wait for the end of the thirty day period in these situations. 71 Federal Register No. 156 at page 46702-03 (8/14/06). OSEP also agreed with commenters requesting that the proposed regulations be changed so that the hearing "may" occur

(rather than the proposed "must" occur) after the thirty day resolution period because the parties might agree to extend the resolution period or they might settle the matter after the resolution period. 71 Federal Register No. 156 at page 46701 (8/14/06).

See the discussion of Weiner Sch Dist 106 LRP 29396 (SEA Ark. 2/27/6) in the discussion of participation above.

G. Enforceability

The IDEA provides that an agreement resulting from a resolution session is legally binding and enforceable in any state court of competent jurisdiction or in a federal district court. Section 615(f)(1)(B)(iii)(II).

OSEP agreed with commenters who argued that because of an inability to afford legal counsel, many families would be left without meaningful redress if they sought to enforce a resolution agreement and had to proceed to court to do so. Accordingly, the regulations permit a party who feels that a resolution agreement has been breached to utilize other state options for enforcement (OSEP uses the example of the state complaint process) if the SEA chooses to make such options available. 71 Federal Register No. 156 at page 46703 (8/14/06).

OSEP opines during the discussion of enforceability that the Act is clear that exhaustion of administrative remedies is not required for enforcement of a resolution agreement in court. 71 Federal Register No. 156 at page 46703 (8/14/06). Query whether the courts will accept the reasoning of OSEP on this point or whether they will require a due process hearing officer to rule first before the courts get involved.

In Bowman v. District of Columbia 46 IDELR 97 (D.D.C. 8/2/6), the Court held that the federal courts have no jurisdiction

over a settlement reached at a due process hearing. The court distinguished between settlements resulting from resolution meetings or from mediations, which the court found to be enforceable in federal court, and other settlements of IDEA cases.

A due process hearing officer concluded that she had authority to enforce a settlement that resulted from a resolution session in Norwood Public Schools 44 IDELR 104 (SEA Mass. 8/19/05). The hearing officer held that any settlement concerning issues of identification, evaluation, placement or FAPE was subject to the hearing officer's jurisdiction.

H. LEA Duty to Schedule/Participate

Under the Act, an LEA is required to schedule the resolution meeting within fifteen days of receipt of notice of a parent's complaint. Section 615(f)(1)(B)(i)(I).

In the analysis of comments section accompanying the new federal regulations, OSEP makes it clear that the resolution session is not required when the LEA is the complaining party filing the due process hearing. 71 Federal Register No. 156 at page 46700 (8/14/06).

OSEP also added a regulation, Section 300.510(b)(5), that provides that where an LEA fails to schedule the resolution meeting within fifteen days, or the LEA delays the due process hearing by scheduling the resolution session at times or places that are inconvenient for the parent, or the LEA otherwise fails to participate in good faith in the resolution process, the parent may seek the intervention of the hearing officer to begin the due process hearing. 71 Federal Register No. 156 at page 46702 (8/14/06). Although OSEP stated that it believes that such occurrences would be very rare, it agreed with commenters that parents should be able to request that the hearing officer begin

the hearing process timelines in such cases. 71 Federal Register No. 156 at page 46702 (8/14/06).

In Massey v. District of Columbia 400 F.Supp.2d 66, 44 IDELR 163 (D.D.C. 11/3/05), the parents were not required by the U. S. District Court to exhaust administrative remedies because the LEA's continuing noncompliance with procedural requirements and its blatant disregard of the IDEA statutory requirements rendered compliance with administrative options futile. The procedural violations included the failure to schedule resolution meetings within 15 days of the complaint, the failure of the LEA to file an "answer" to due process complaints, and the failure to place the student for several weeks. Concerning the failure to schedule resolution sessions, the Court rejected the LEA's assertion that it could not reach the parents by telephone.

Contrast Spencer v. District of Columbia 416 F.Supp.2d 5, 45 IDELR 11 (D.D.C. 1/11/06), in which the parent filed for due process on December 6, 2005. The LEA scheduled a resolution meeting for December 21st. The parent withdrew the due process complaint on December 14th. The LEA cancelled the resolution meeting. The parent then refilled the due process complaint on December 21st. The LEA scheduled a resolution meeting in January, 2006. The parent then filed in federal court for injunctive relief claiming that the LEA had not convened a resolution meeting within 15 days of the original filing and, therefore, exhaustion of administrative remedies was futile. The U. S. District Court rejected the argument and required the parent to first exhaust administrative remedies by pursuing the due process hearing.

A hearing officer determined that a resolution meeting is not required when an LEA files a due process hearing complaint notice in Hopkins Pub Schs 106 LRP 37009 (SEA Mich. 4/22/6). The hearing officer noted that the resolution session process is only required when a parent files a due process complaint notice.

I. Not an IEP Team Meeting

Although the resolution meeting includes "relevant" members of the IEP Team, it is clear that the resolution meting is not an IEP Team meeting. The purpose of the resolution meeting is for parents to discuss their complaint and the underlying facts and for the LEA to have an opportunity to resolve the dispute. Section 615(f)(1)(B)(i)(IV); 71 Federal Register No. 156 at page 46701 (8/14/06).

In response to a commenter who questioned whether a resolution meeting agreement supercedes decisions made by the IEP Team, OSEP stated that nothing in the Act or regulations requires an IEP Team to reconvene following a resolution agreement that includes IEP-related matters. 71 Federal Register No. 156 at page 46703 (8/14/06).

In the case of In Re: Foxborough Regional Charter Sch 106 LRP 34379 (SEA Mass. 5/30/6), the hearing officer rejected the school district argument that a resolution meeting was an IEP Team meeting, and that an offer of extended school year services made at a resolution meeting constituted a program proposed by the IEP Team. Accordingly, the hearing officer ruled for the parents and ordered ESY services and two IEES. See, also West Hartford Bd of Educ 106 LRP 25095 (SEA Conn. 2/3/6), rejecting an argument that a resolution meeting supplants the IEP Team meetings.

J. Ethical Issues

The resolution meeting process also raises a number of potential ethical issues. If one party is functionally illiterate or is highly unsophisticated, the other party may be tempted to take advantage of them at the resolution meeting. The danger is

especially high when the unsophisticated party is not represented by counsel.

OSEP declined the request of some commenters to require dispute resolution training for parents, although it noted that nothing in the Act prevents a state or local public agency from offering dispute resolution training for parents or from referring them to organizations that provide such training. 71 Federal Register No. 156 at page 46701 (8/14/06).

Although the issue came up in the context of parents lacking education or sophistication concerning their right to void a resolution agreement within three days, OSEP seems to rely heavily upon the required notice of procedural safeguards as a sort of equalizer, negating any lack of sophistication or education on the part of parents. 71 Federal Register No. 156 at page 46703-04 (8/14/06).

In DeSoto County High Sch 106 LRP 39825 (SEA Miss. 6/14/6), the parent notified the hearing officer that she was confused by the notice of the resolution meeting. The hearing officer assured the parent that the school district was required under the law to schedule a resolution meeting. The parent did then attend, but the resolution meeting did not result in an agreement, and the matter proceeded on to a due process hearing.

A clearer example of an ethical issue is provided by the case of Mr & Mrs S ex rel BS v. Rochester Community Schs 106 LRP 58719 (W.D. Mich. 10/2/6). In that case, the parents were seeking an Independent Educational Evaluation. A resolution meeting was held, and there is some dispute concerning the involvement of the attorney for the school district in the resolution process. After extensive negotiations, the parties signed a resolution agreement. The parents later voided the agreement after talking to their lawyer because they had not realized that in signing the agreement, they were giving up the right to an IEE for their child. An obvious ethical problem is present where parties walk out of

the resolution meeting having signed an agreement but not knowing the key terms and conditions that they have agreed to.

An issue pertaining to legal ethics may also arise. Where an attorney knows that the other party is represented by counsel, the cannons of ethics prohibit direct communication between counsel and the represented party concerning the facts underlying the dispute outside the presence of their lawyer. Similar ethical rules may be implicated by analogy where an attorney encourages discussion of the facts by represented parties at a resolution meeting. See the discussion regarding the role of attorneys in Section II D. above.

K. Resolution Process in Expedited Hearings

In student discipline cases requiring an expedited hearing the deadlines for the resolution process are changed. The resolution meeting must be convened within seven (rather than 15) days. Section 300.532(c)(3)(i). The resolution period is shortened to fifteen (rather than 30) days. Section 300.532(c)(3)(ii). In response to the concerns of commenters, OSEP clarified that the seven and fifteen day periods begin upon receipt of notice of the parent's due process complaint. 71 Federal Register No. 156 at page 46725 (8/14/06).

One important change from the proposed regulations involves the period for disclosure of evidence prior to an expedited due process hearing. The proposed regulations would have allowed states to reduce the deadline for disclosure from five to two business days before an expedited due process hearing. {Proposed Section 300.532(c)(4)}. OSEP was persuaded by the commenters that limiting the disclosure period to two days would significantly impair the ability of parties to prepare for hearing, and, therefore, dropped the proposed exception to the five-day rule. 71 Federal Register No. 156 at page 46725-26 (8/14/06).

NOTE: there are three kinds of days involved in an expedited due process hearing. The due process hearing must be scheduled within 20 ***school days*** of the date the complaint is filed and the hearing officer's decision is due within 10 ***school days*** of the hearing. Section 615(k)(4). The resolution meeting must occur within 7 ***calendar days*** and the resolution period is 15 ***calendar days*** of receipt of notice of the complaint. Section 300.532(c). The deadline for disclosure of evidence prior to an expedited hearing, like any other due process hearing, is five ***business days***. Sections 300.532(c)(4); 300.512(a)(3).

L. Other Procedural Problems

One problem for many LEAs is how to structure the resolution meeting. Many commenters sought guidance from OSEP on the protocol or structure of procedures for conducting a resolution meeting, including whether an impartial mediator or facilitator should be present. While ducking the issue of the presence of a neutral, OSEP expressly declined to specify a protocol or structure for resolution meetings to avoid interfering with efforts of parties to resolve the complaint. 71 Federal Register No. 156 at page 46701 (8/14/06). OSEP did approve, however, of the use of alternative means of participation for resolution meetings, such as conference telephone calls or videoconferences, where appropriate. 71 Federal Register No. 156 at page 46701 (8/14/06).

A similar problem involves how to write an agreement, particularly in view of the restrictions on the presence of attorneys. In response to commenters requesting a model settlement agreement, OSEP declined stating that because the terms of settlements agreements will necessarily vary, it would not be practical or useful for SEAs to develop model settlement agreement forms. 71 Federal Register No. 156 at page 46704 (8/14/06).

III. BEST PRACTICES

A. Parties to A Resolution Meeting

In view of the problems raised above, I contend that where a facilitator is not provided, it is best practice to attempt to agree to mediation through the state system in lieu of the resolution meeting. Mediation would eliminate confidentiality concerns because confidentiality of mediation discussions is expressly protected by IDEA. Moreover, counsel are not prohibited from appearing at mediation sessions, and the agreement to mediate should remove any question as to parental participation. More importantly, settlements can only occur if the parties are truly willing to consider settlement. If the parties are open to settlement, the presence of a trained mediator or other skilled neutral should greatly increase the likelihood that a mutually agreeable and lasting resolution can be made.

A handful of states are experimenting with providing a trained facilitator at state expense for resolution meetings. Preliminary reports from such states are encouraging in that the resolution meetings are working well. OSEP did not rule out the use of a facilitator or other neutral at a resolution meeting when asked about the possibility by commenters. 71 Federal Register No. 156 at page 46701 (8/14/06). OSEP declined to address procedural structure or protocol for a resolution meeting, but was silent as to the presence of a mediator or facilitator. Mediation in lieu of resolution, or in the alternative, the presence of a facilitator at the resolution meeting, is best practice in my opinion.

In the event that mediation cannot be agreed to and facilitation is not provided, I recommend that the parties try to agree to waive the resolution session. If neither mediation nor waiver can be agreed to, the resolution meeting must occur and extreme caution is advised.

B. School Districts

Every school district, in consultation with its lawyer, should adopt a policy designating in writing the staff that has decision making authority for purposes of the resolution meeting. These persons must have the authority to commit the resources of the LEA to support any settlement agreed to at a resolution meeting. A policy requiring LEA staff to carefully explain all provisions of a resolution agreement to parents would be ethical best practice, as well as legally advisable.

Whenever a due process complaint is filed by a parent, the school district should schedule a resolution session within 15 days of receipt of the complaint. Although the meeting should be scheduled at a time and place convenient to the parents and "relevant" IEP team members, the meeting ***must*** be scheduled within the 15 day period. Districts should also consider, as always in consultation with their lawyer, adding to the bottom of the letter notifying the parents of the meeting boxes which the parents may check and return agreeing to mediation in lieu of resolution or agreeing to waiver of the resolution meeting. Each box should be accompanied by a brief but fair description of the options of mediation, waiver and resolution meeting.

IV. IDEA'04 Statutory Provisions

The following portions of the reauthorized statute pertain to mediation and resolution sessions:

`SEC. 615. PROCEDURAL SAFEGUARDS.

...`(f) IMPARTIAL DUE PROCESS HEARING-

`(1) IN GENERAL-

...

`(B) RESOLUTION SESSION-

`(i) PRELIMINARY MEETING- Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint--

`(I) within 15 days of receiving notice of the parents' complaint;

`(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

`(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

`(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

`(ii) HEARING- If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part shall commence.

`(iii) WRITTEN SETTLEMENT AGREEMENT- In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is--

`(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

`(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

`(iv) REVIEW PERIOD- If the parties execute an agreement pursuant to clause (iii), a party may void

such agreement within 3 business days of the agreement's execution.

...

`(i) ADMINISTRATIVE PROCEDURES-

...

`(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES-

...

`(D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES-

...

`(ii) IEP TEAM MEETINGS- Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

`(iii) OPPORTUNITY TO RESOLVE COMPLAINTS- A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered--

`(I) a meeting convened as a result of an administrative hearing or judicial action; or

`(II) an administrative hearing or judicial action for purposes of this paragraph.

V. Federal Regulations

The final federal regulations (effective 10/13/06) contain the following provisions concerning the resolution process:

Sec. 300.510 Resolution process.

(a) Resolution meeting. (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under Sec. 300.511, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that--

(i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and

(ii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (a)(1) and (2) of this

section need not be held if--

(i) The parent and the LEA agree in writing to waive the meeting; or

(ii) The parent and the LEA agree to use the mediation process described in Sec. 300.506.

(4) The parent and the LEA determine the relevant members of the IEP Team to attend the meeting.

(b) Resolution period. (1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under Sec. 300.515 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in Sec. 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(5) If the LEA fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in Sec. 300.515(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting;

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

(d) Written settlement agreement. If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is--

(1) Signed by both the parent and a representative of the agency who has the authority to bind the agency; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to Sec. 300.537.

(e) Agreement review period. If the parties execute an agreement pursuant to paragraph (c) of this section, a party may void the agreement within 3 business days of the agreement's execution.
(Authority: 20 U.S.C. 1415(f)(1)(B))

Sec. 300.532 (Discipline Cases) Appeal.

…

(c) Expedited due process hearing. (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of Sec. Sec. 300.507 and 300.508(a) through (c) and Sec. Sec. 300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

…

(3) Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in Sec. 300.506--

(i) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

(4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in Sec. Sec. 300.510 through 300.514 are met.

(Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A))