

How to Negotiate a Win-Win in Special Education Disputes

by

Jose L. Martín
Attorney at Law

RICHARDS LINDSAY & MARTÍN, L.L.P.
13091 Pond Springs Road, Suite 300
Austin, Texas 78729
jose@rlmedlaw.com
Copyright © 2010 Richards Lindsay & Martín, L.L.P.

Both schools and parents are best served by using their energies to resolve special education disputes among themselves, rather than litigating and letting others solve their disputes for them. Ideally, the parties should work toward a “win-win” resolution—one that addresses the parties’ mutual concerns, achieves a stabilization of the dispute, and directs the parties toward a return to the baseline collaborative approach that the law envisions for decision-making under the IDEA.

Emerging Promising Practices for Dispute Resolution

Staff training on conflict resolution strategies and techniques

Inept handling of an initial parental concern by a school staffperson can be the beginning of a steady loss of trust and a worsening relationship that culminates in litigation. Schools, however, cannot realistically expect staff with no training on handling complaints and conflicts to simply learn basic conflict resolution skills on the job. Many service industries have learned that good customer service depends on how staff deals with customers and their complaints. To that end, companies ensure that staff that deal personally with customers receive some level of training on customer service and conflict resolution. Public schools, themselves a service industry of sorts, should follow the private sector’s lead and provide school staff with conflict resolution training also.

The best strategy for dispute resolution with parents is not allowing a concern to escalate to the point that it becomes a dispute. If that is not possible, then the goal is to manage and resolve the dispute early, before the parent-school relationship as a whole is threatened. If IEP team members learn and utilize simple conflict resolution strategies, they can drastically reduce the possibility of a matter escalating to litigation. Schools currently provide IEP team members with a variety of curriculum, instructional, and even legal training, but often overlook staff training on conflict resolution from a customer service orientation. Explore this proactive step by researching the numerous training programs

available in your community and exploring the possibility of adding this type of training to your existing staff development programs. This type of training program will pay for itself many times over if it helps avoid just one due process hearing.

Selecting a staffperson to serve as a parent liaison/ombudsman

The idea of designating a particular staffperson to serve as a parent liaison or conciliator has been put into effect by school districts under a variety of formulations. Larger school systems may choose to create a position for the purpose of assisting parents and IEP teams in resolving their differences. The notion is that a staffperson unrelated to the actual dispute and not an employee of any particular campus can bring objectivity to a conflict and fresh approaches and ideas. Parents can resort to the liaison to assist with conflicts with campus personnel or related service providers. In large school districts, these staffpersons can bring campus compliance concerns to central office administrators. With proper training in conflict resolution techniques, parent liaisons can bridge communication difficulties, make campus staff aware of available resources, assist parents in understanding their rights, help access community programs, or just lend an ear to a frustrated parent.

In some school systems, these positions actually take the form of an informal mediator who functions within the IEP team process to assist the team in reaching consensus. In smaller school systems, a staffperson with other job duties can be provided specific mediation and conflict resolution training, or a volunteer group of experienced special education parents could be selected to assume liaison functions.

Yet another twist on the strategy is to set up a special education “hotline” where parents can call and ask questions, raise concerns, and generally ask for assistance outside of their child’s campus and IEP team. The hotline is manned by staff who take down notes and information and return the parents’ call with a response. The hotline staffpersons, however, have to make clear to parents that they cannot speak for the IEP team or change its decisions, but that they are able to answer basic questions and take information necessary for the special education department to respond.

Assigning parent mentors to parents in need

A variation on this strategy is to pair all new parents of special education students with a mentor parent who helps guide the “beginner” parent through the sometimes overwhelming IEP team process. Another variation is for school districts to develop relationships with reasonable parent advocates and take the initiative of involving such a person in a dispute, especially in situations where a parent is assuming clearly unreasonable or unrealistic positions. In these situations, a good advocate can be invaluable, since a parent is much more likely to be responsive to a fellow parent that is not an employee of the school.

Preparing for potentially disputed IEP team meetings

School staff faced with a potentially contentious IEP team meeting must prepare for the meeting as if for a formal mediation session. Pre-meeting staffings are essential to accomplish some or all of the following tasks:

- Draft tentative IEP goals and objectives for IEP team discussion
- Anticipate problem issues
- Brainstorm and develop potential proposals and contingency plans (alternate proposals or options)
- Prepare documentation of student progress
- Review new assessment data
- Develop a meeting agenda
- Gather relevant campus-based information
- Review relevant federal and state regulations
- Confirm that proper notice of the IEP team meeting has been sent and received by the parents
- Consider current parent concerns (if already voiced)
- Ensure attendance of all IEP team members and participants
- Ensure availability of a meeting site (preferably quiet and comfortable)

Most of the preparation strategies applicable to mediations or dispute resolution also apply to prepare for contested IEP team meetings. As simple as this strategy may sound, too many important IEP meetings are held with little or no staff preparation. Worse yet, on the day of the meeting, IEP team members arrive late, forms have to be located at the last minute, no one at the front office knows to direct the parents to the meeting room, etc. These details tell parents that the school is disorganized, and promote a perception that the meeting, and therefore the student, is not considered important. Schools cannot leave that impression and expect parents to trust in their efforts to provide appropriate educational programs.

The New Dispute Resolution Opportunity—Resolution Sessions

IDEA 2004 offers a new opportunity for resolving disputes after a hearing request is filed. IDEA 2004 contains a new provision requiring the school and the parents to meet in a “resolution session” to discuss the parents’ complaint within 15 days after the complaint is received, unless they agree in writing to waive the meeting or to attempt mediation. 20 U.S.C. §1415(f)(i)(IV). If the complaining party amends their complaint notice, the timeline for the resolution session commences from the date of the amended complaint notice. §1415(c)(2)(E)(ii).

Unless waived, the session is a prerequisite to the opportunity for a hearing. The law now states that the school must convene the resolution session and include in it a representative with “decisionmaking authority” on behalf of the school. §1415(f)(i)(II). “Relevant members of the IEP Team who have specific knowledge of the facts identified in the complaint” must participate. §1415(f)(i).

Attorneys are not welcome at the resolution session. The law states that the school “may not include an attorney of the local educational agency unless the parent is accompanied by an attorney.” §1415(f)(1)(i)(III). At the meeting, “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 . . .” §1415(f)(1)(B)(i)(IV). If a resolution is reached at the session, the parties must enter into a legally binding agreement signed by the parties and enforceable in state or U.S. district courts. §1415(f)(1)(B)(iii). Either party “may void such agreement within 3 business days of the agreement’s execution.” §1415(f)(1)(B)(iv). The hearing timeline commences if the school “has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint . . .” §1415(f)(1)(B)(ii). Thus, the school is not obligated to offer to resolve the complaint at the resolution session proper, but may consider its options and offer to resolve the complaint up to 15 days after the session.

The fundamental question is whether the resolution session is an effective forum for resolving disputes and avoiding litigation. From the parties’ perspective, it represents an opportunity to discuss the dispute, albeit without the assistance and direction of a trained mediator. At the very least, the session can begin the process of the parties discussing the case. In some cases, the offers and counteroffers made in the session can lead to future resolution, if the matter is not resolved at the session itself. Even if the session does not end in agreement, the school has another 15 days to come up with an offer satisfactory to the parents.

Negotiation Strategies and Techniques

A. Prepare proposals and contingency options for every issue

The dispute resolution process begins before the day of the actual meeting or mediation session. To use the limited time available in the most productive way, school representatives must prepare. The preparation process starts with a list of all disputed issues known to the school. For each issue, the school must prepare a range of proposals and contingency options that it is ready to offer to resolve each issue. Determine which person in the team will actually present the proposals and do most of the talking. Once a list of proposals and contingency options are ironed out, school representatives must ensure that they have the authority to commit to such deals.

B. Identify and separate negotiable from “deal-breaker” issues

In every mediation or dispute resolution session, there will be a certain number of disputed issues. One of the main jobs of mediators is to identify with clarity and precision each and every issue currently in dispute between the parties. Beyond this overall issue identification process, however, it is useful to speedily identify the issues that are clearly negotiable and susceptible to quick resolution. Dealing with “easy” issues first allows the parties to identify more fundamental issues—those less susceptible to straightforward resolution.

Sometimes all issues but one are negotiable, but that single issue can doom a mediation to impasse.

For example, a parent's attorney may raise seven separate legal issues in pursuing a claim for residential placement, but even if the school system is willing to meaningfully address all disputed legal issues, the case may not be capable of resolution if the parents are unwilling to give up on their ultimate goal—funding for residential placement. In this situation, it is crucial to identify the “deal-breaker” issue upon which all of the dispute resolution effort lies. Then, the parties can make a decision to either focus energies on the fundamental issue, or make more extensive offers on alternative remedies in exchange for compromise on the “deal-breaker.” In formal mediation, when faced with inflexible positions on a particular issue, it is key to fully enlist the mediator's help. Trained mediators can then bring their efforts to bear to attempt to break through the inflexible position.

C. Proceed from “easy” issues to difficult ones

In mediation, it is generally advantageous to begin by resolving issues capable of straightforward resolution, to then proceed to more difficult claims and allegations. Psychologically, achieving consensus on a number of claims serves to create pro-agreement momentum among the participants. Once this positive mindset is in place, the difficult and “deal-breaker” issues are likely to become more susceptible to resolution.

For example, a parent may have filed a request for an IDEA due process hearing to seek prospective funding for a Lovaas-style Applied Behavior Analysis (ABA) home program for her child with autism. In mediation, when asked about her concerns with the current school IEP, she may raise concerns regarding evaluations, goals and objectives, PT services, staff-to-student ratio, and lack of assistive technology devices. If the school meaningfully addresses these specific concerns by offering independent evaluations, revision of goals and objectives, increase in PT services, additional staff assistance to improve the staff-to-student ratio, and added technology, the parent and her attorney may become more amenable to dropping their request for a full ABA program. If the school makes clear that it is willing to negotiate on all disputed issues, short of paying for an ABA home program, the parent and her attorney may recognize that persisting with the ABA program demand may doom the mediation to impasse, lead to litigation of uncertain results, and the loss of the offerings made by the school.

If the school's offers are attractive, it takes a gambling soul to reject them in the hopes of winning the ultimate reward in litigation. Moreover, if the parent has an attorney who is working on a contingency arrangement, and the parent unreasonably rejects meaningful offers in order to gamble on obtaining the ABA program, the attorney is more likely to counsel the client in favor of settlement, since pursuing a risky claim may mean that the attorney ultimately receives no remuneration for his or her work. If faced with parental reluctance to desist from

demanding the ABA program, the school can respond by increasing the offers on the negotiable claims.

D. Refrain from direct discussion of merits of case

Parties to mediation or dispute resolution must understand that the process is not designed to lead to legal opinions or findings on the relative merits of the case. The process should focus on the parties reaching mutually agreeable compromises to disputed issues, which are then committed to writing in the form of a mediation agreement. School attorneys that present a “case,” complete with legal assertions and arguments, may simply be previewing the school’s legal and evidentiary defenses while accomplishing little in the way of moving toward a compromise. This is not a “pre-litigation” process. It is, rather, an alternative to adversarial due process hearings and court appeals. In fact, too much discussion of the merits of the case can significantly distract the parties from the goal of working toward a mutually agreeable settlement. In addition, detailed discussion of legal argument and evidentiary merits may serve as free discovery to an opposing party, who will then be better armed for litigation when mediation fails. Discussion of parties’ relative positions on the merits also can increase negative and adversarial postures, making the reaching of an agreement in fact more complicated.

Certainly both parties to a special education dispute should assess the relative merits of their cases, undertake research on legal points, and develop favorable legal arguments in preparation for potential litigation. But when parties agree to participate in mediation, they should be prepared to temporarily forego legal positions and arguments in order to focus their efforts on achieving a compromise agreement. If parties are unable to set aside legal positions, at least for the duration of a dispute resolution session, they should seriously reassess whether to expend the time, energy, and money involved in participating in mediation.

E. Move to offers and counteroffers as early as possible in the process

Dispute resolution should allow the parties, and especially the parents, to verbally vent their complaints to some degree, usually at the beginning of the session, before turning to the issue of potential means for resolution. After the parents have finished presenting their complaints, the tendency for school district representatives is to counter with a procession of defensive arguments or explanations on each issue. Parties may find, however, that making an effort to move quickly to exchanges of offers and counteroffers will promote the reaching of an agreement within a shorter timeframe. The key is to shift the parties’ focus away from arguing their case to suggesting ways to resolve the disputed issues.

In formal mediation, mediators should be of assistance in that effort, since they also will share a desire to move from argument to specific offers and counteroffers. Once the mediator has succeeded in identifying the disputed issues, the school representatives can proceed to make initial offers on any and all negotiable issues. If this stage is achieved quickly, the process moves away

from emotionality and defensiveness and toward creative problem-solving. This does not mean that offers will be immediately accepted, but it gets the parties into a bargaining mood, where an offer is met by a counteroffer, which leads to a revised offer, and so on, until the first issue is resolved and the parties move to the next. Otherwise, parties may literally spend hours arguing and re-arguing their cases, which builds up anxiety and anger, and can actually harden positions.

F. Select an approach to presenting offers

There are various approaches to presenting offers, but they generally break down to two main methods: the incremental offer approach, the solid initial offer approach, and the options approach. Selecting an approach depends on a party's flexibility and whether the amount of time spent is an issue.

In the incremental offer model, the responding party (usually the school in IDEA cases) proposes offers on disputed issues in small increments. For example, if the issue is amount of speech therapy services, the school representatives would initially offer only a slight increase in services. A counteroffer from the parent would lead to a slightly increased offer, and so on. The benefit of this approach is that the parties may reach an agreement on speech services that is actually lower than the school was prepared to ultimately serve up to resolve the speech issue. The drawback of this "little-by-little" haggling approach is that it will generally take significantly more time to reach resolution on each issue, which can lead to a lengthy and protracted dispute resolution or mediation session.

In the solid initial offer approach, the operative goal is time-effectiveness and directness. Here, the school makes an offer that is at or close to the final offer it is willing to make on any issue. The message to the opposing party is that the offer is not meant as a "low-ball" offer, but rather as an honest effort to resolve the issue quickly and without much additional discussion. Moreover, the school must make clear that additional negotiations on the offer should be quite limited if the issue is to be resolved at all. The advantage of this method is that issues can be resolved literally in minutes, leaving substantial amounts of time to deal with tougher disputes. The disadvantage is that the most favorable deal possible may not be extracted on individual issues.

The options approach consists of presenting proposals in an options format, where the opposing party is asked to pick from one of a number of options designed to address the disputed issue. The psychological advantage of this method is that people are more likely to agree with a proposal that gives them the power to select an option. In addition, even if none of the options are accepted, one option might form the basis for an eventual revised offer that results in an agreement on that issue.

G. In formal mediations, actively enlist the mediator in individual caucus sessions

In many mediations, group discussions with both parties are alternated with individual caucus sessions between the mediator and each party. The caucus sessions can be used to gain favor with the mediator in the hope that he or she will influence the other party to move closer to your party's bargaining position. These sessions can be especially useful if a party is adopting a highly inflexible position on certain or all issues. A common stance with the mediator in caucus sessions is to establish clearly that your party is willing to negotiate reasonably, but not without commensurate compromise from the opposing party. Show the mediator, by both word and deed, that your party is the more reasonable, and the opposing party will be cast as the inflexible party. This will lead the mediator to put pressure on the opposing party to move closer to consensus.

H. Remain professional

Special education disputes are particularly difficult and personal because they involve parents and their children with disabilities. A parent's normal protectiveness is amplified by the fact that their child is disabled and has specialized needs. The school can become a focus of undirected anger, frustration, and disappointment. Despite objective evaluation data, some parents may have expansive and sometimes unrealistic expectations. These attitudes clash with the inevitably limited resources available to provide quality education to disabled students. Add to this mix the fact that some schools' have serious compliance and program deficiencies, and you have all the ingredients for emotional outbursts and personal attacks. Dispute resolution fora, moreover, offers a face-to-face forum for such displays, from either side. School representatives, however, simply do not have the luxury of engaging in these tactics. Their job, in dispute resolution, is to "ride through" these episodes with the assistance of the mediator (in formal mediation), who should bear the primary responsibility for maintaining decorum in the mediation session. Respond to emotional outbursts with calm, positive, but honest statements. For example, if a mother breaks down while discussing how a school has failed to educate her child in general, it may help to say something like "it is clear to us that you're upset about your child's program, and we don't know if we can change the way you feel, but we hope that by the end of today, with your help, we'll have an agreement that will at least point us toward a more positive direction. Will you help us try to do that?"

I. Learn to spot the attrition or "dispute resolution fatigue" strategy

A tactic some parties may use in dispute resolution basically consists of slowly wearing down an opposing party's position by extending discussions and drawing out the session without offering much in the way of compromise. This tactic counts on the fact that as party representatives become tired, they may be more susceptible to giving in on particular issues, just to bring an end to the session. A useful counter-tactic is to briefly state your party's proposals on a

particular issue, and then be silent. In mediation, the mediator will begin to put pressure on the recalcitrant party, in order to keep the process moving. Do not hesitate to tell the mediator that the opposing party is using this tactic and that you expect some action to get the mediation back on track.

J. Draft the mediation/dispute resolution agreement as you negotiate the terms

It is not a good idea to discuss issues, work on a resolution of each, and at the end of the mediation initiate a draft of the agreement. That invites disputes, late in a mediation session, over the language of a term. Many times parties may not have clear memories or notes of agreements reached hours before. Drafting the mediation agreement as you proceed from issue to issue is clearly advantageous. Viewed in this fashion, the mediation is broken down into mini-mediations on individual issues. Once an issue is successfully mediated, that agreement should be committed to writing. The drafter should read the term out loud as he or she writes it, until the parties are in agreement that the language matches the substance of the parties' agreement on that term. Then, the parties can move to the next issue. At the end of the session, there should be no need for further discussion over the language of the agreement, no matter how long or complex it may become.

Another option—in formal mediation—is for the mediator to be responsible for the drafting of the agreement. It is in the interests of both parties, however, that the mediator commit the agreements on each issue to writing as you mediate the entire case, rather than at the end of the process.

K. Make sure the mediation/dispute resolution agreement terms are clear

The last thing either party to mediation wants is for the mediation agreement to later become the subject of additional dispute itself. This can happen if the mediation agreement is either unclear or incomplete with respect to a significant issue. Experienced advocates and mediators are invaluable in avoiding this pitfall, since they are likely to identify potential ambiguities or contingencies that need to be addressed in the agreement if it is to succeed in its goal of resolving the entire dispute. Pay attention to details and refrain from playing games with the language—the aim should be to set forth in a straightforward and clear fashion the agreements reached by the parties. Avoid future disputes by ensuring that parents clearly understand what the school district will or will not do under the agreement. It is better to have the parent understand that you mean 30 minutes per week of *group* counseling rather than one-to-one counseling than have the dispute re-erupt a few days later over that very distinction. Parents will feel deceived, when in fact the issue is one of clarity in the mediation process. It is better to get the issue out in the open than to hope that it will not surface at a later time.

L. Watch for the huge initial demand strategy

Another tactic to be watchful for is one where the complaining party begins the dispute resolution session by demanding an impossibly expansive array of requests. The tactic works by stunning the school representatives, so that they feel like they must make extraordinary offers on the disputed issues just to come within the vicinity of the parents' huge set of requests. The key to offsetting this "bluff" strategy is to remain calm and stick to the game plan. Make normal and reasonable offers on the disputed issues and enlist the help of the mediator in individual caucus sessions. Eventually, the parents should return to more regular demands if they have any desire to honestly mediate the case. If the parents do not reduce their initial set of demands, this is a sign of unwillingness to truly compromise toward resolution of the matter.

M. Insist on bilateral compromise

Just as the school representatives must be prepared to make compromises on disputed issues in order to succeed in mediation, parents must understand that the effort to resolve a special education dispute does not consist of simply persisting on precisely each of the demands previously made of the school. Insist that in order to resolve the case, some compromises will have to be made by both parties. Dispute resolution is not a process whereby a party simply explains why they are entitled to every bit of what they have previously demanded. To avoid the monetary and emotional costs of litigation, a party has to give up something. If one party comes to mediation to be completely inflexible on their position and demands, then they are not ready to mediate the case.

N. In mediation, schools should insist on appropriate waiver/release language

Mediation agreements are intended to resolve all current disputes between the parties in order to avoid litigation. Parents cannot expect to mediate a case, obtain favorable terms, but nevertheless also retain the right to sue on the mediated issues. If a parent is unwilling to agree to language releasing the school from liability on the disputed issues, then there is no guarantee that litigation will truly be avoided, as the parent will retain the ability to change their mind the day after the mediation agreement is signed and reinstate the litigation. The mediator should establish, at the beginning of the mediation, that the goal is to resolve all the disputed issues, so that there will be no litigation.

O. In difficult cases, explore segregation of certain issues

Although, as stated above, the ultimate goal of mediation is to conclusively resolve all disputed issues, in some cases this will be impossible. An agreement may be possible on 14 out of 15 issues, and the last issue may be a non-negotiable, deal-breaker issue for one or both parties. The potential agreement on the 14 negotiable issues can be salvaged, however, if the parties reach an agreement to settle those issues and proceed to a limited litigation on the single non-negotiable issue. For example, the parent of a child with learning

disabilities may raise a variety of issues relating to IEP goals and objectives, related services, reports of progress, teacher assignment, and a request for a laptop computer for home use. If the school and the parents can reach an agreement on all issues except for the computer request, they can choose to enter into an agreement on the negotiable issues and leave the single remaining computer issue for the hearing officer. In many cases, such an approach is favorable to the school, if there is any concern over the legal merits of some negotiable issues, but no significant concern on the assistive technology issue. Moreover, the cost of preparing for a limited hearing will be substantially less than to litigate the entire list of disputed issues. This strategy should be at least explored in cases where a number of issues are susceptible to agreement except for a few “deal-breaker” requests.

P. In formal mediations, deal with attorneys’ fees

Generally, parents who initiate litigation and obtain a favorable settlement of the dispute prior to a hearing are entitled to reasonable attorneys’ fees. If fees are not addressed as part of mediation, parents may be unwilling to agree to an educational settlement, especially if their arrangement with counsel is that they are liable for their attorneys’ fees if the school system is not. Even in contingency fee arrangements, unwillingness to address attorneys’ fees may reduce the chances of reaching a mediation agreement. Or, the attorneys’ fees issue may be severed from the educational dispute and litigated in federal court, continuing at least one aspect of the litigation and its attendant costs. Thus, if a fundamental desire of the parties is that all disputed issues are addressed and resolved as part of mediation, parties must be prepared to meaningfully consider the issue of parent attorneys’ fees.

One school of thought is that attorneys’ fees should be discussed first so that the monetary issue (usually of great significance to school officials) is disposed of first to allow the parties to focus on the underlying educational issues. Moreover, addressing the fee issue first can reveal if that aspect of the dispute is a fundamental or “deal-breaker” term. If the school district is unwilling to agree to any mediation resolution that includes attorneys’ fees, or if the parents’ attorney is unwilling to negotiate on the fee amount under any circumstances, it may be advantageous to quickly identify and treat the matter as a fundamental one. In such situations, the parties can consider an agreement to sever, or separate, the educational terms of the dispute from the fee dispute. Then, the fee dispute could be negotiated separately, while the educational terms of the agreement proceed to implementation. If no agreement is reached on the fee issue, then the parents’ attorney can proceed to an action in federal court to seek fees under the IDEA. This approach salvages the educational aspect of the agreement, which should be of primary importance to the parties.

Another approach is to simply focus on the educational issues by addressing them first, in the hopes of casting fees in the role of a concluding detail of mediation. This approach carries the weight of momentum, in that if the parties have reached mutually agreeable compromises on every educational claim, the parties may be more inclined to deal reasonably with the fee issue to

avoid wasting a full mediation effort simply because of a last-minute impasse on fees. Consequently, however, this approach may mean that in some cases the parties will expend the full energies required to mediate the educational issues only to have the agreement unravel because of failure to agree to the sole non-educational fee issue.

As to the fee negotiation itself, parties may adopt an overall approach, whereby suggested offers and counteroffers on fees are exchanged without regard to an accounting of billable hours and hourly rate. Other parties may prefer to act on the basis of reviewing a parent attorney's record-keeping of billable hours and an area's prevailing hourly rate for similar legal work. Under both methods, parties will want to acquaint themselves with fee awards by federal courts in the jurisdiction, to properly assess the potential range of a reasonable fee.

When Mediation Fails

If all informal and formal measures fail, defending parties should consider an Offer of Judgment

In some cases, even the best efforts at resolving the complaint informally or formally, may fail to result in a mutually agreeable compromise. If the school feels it has made meaningful and substantial offerings to address a parent's concerns and claims, but the parents have rejected all offers and options, the next step is to issue an Offer of Judgment under 20 U.S.C. §1415(i)(3)(D)(i) and FED. R. CIV. P. 68. An offer of judgment, if issued at least ten days before the date of a scheduled due process hearing, can be a useful device to pressure an unreasonable party into reconsidering settlement.

It works in the following way. If a school makes an offer of settlement containing all proposed offers previously refused by the parent, and the parents reject the offer and proceeds to hearing, the parents will not be entitled to attorneys' fees incurred after the offer was made unless they ultimately obtain a greater degree of relief from the hearing process than was offered in the offer of judgment. Thus, if parents unreasonably reject a valid and substantial offer of judgment, their attorney stands to lose a significant portion of his or her attorney's fee entitlement if they do not prevail to a greater degree in litigation. This dynamic forces the parents' attorney to readdress the matter with the parents, and in many cases serves to put pressure on an unreasonable party to "see the light." Depending on the agreement between the parents and their attorney, the parents themselves may be responsible for their attorney's fees if they reject a reasonable offer and they eventually receive less from the hearing officer than the school originally offered. All school attorneys should mark on their calendars the deadline for issuing an offer of judgment to the parents, just in case all efforts at alternative resolution fail to resolve the case.

When all else fails, explore creative options

Some cases are not easily susceptible to regular dispute resolution strategies, either because of the complexity of the case, the depth of disagreement between the parties, the fundamental nature of the dispute, or the presence of particularly difficult personalities on either side. This does not mean, however, that the case is doomed to litigation. At this juncture, parties should investigate the possibility of unique and creative options that may at least temporarily resolve even deeply entrenched disputes.

An interesting creative approach for use in cases where there are longstanding conflicts and mistrust among the parties involves the appointment of an agreed-to ombudsman. This is a person with specialized expertise in special education who will review the records in the case, interview parents and staff (and perhaps the student), and render final binding decisions on disputed issues. The term of the ombudsman's position is set forth in an agreement, and during that term, there can be no requests for due process hearings, SEA complaints, or requests for independent evaluations. On any issue where the parties cannot achieve consensus, the ombudsman simply renders a final decision, to which the parties must agree to abide, at least during the period of ombudsmanship. The parent, however, cannot be prevented from reinitiating the litigation once the ombudsman's term has expired. But, at least the device accomplishes a moratorium on legal proceedings, complaints, and requests for independent evaluations. In cases where there are serial complaints and repeated due process hearings, the school may well feel that the ombudsman strategy at least affords school staff a respite from the litigation and dispute process. The school, moreover, must generally pay for the ombudsman's services, and must also be prepared for the possibility that the ombudsman will not support the school's positions on particular issues. In addition, the school cannot limit the ombudsman's access to records and information regarding the student, which is instrumental to the ombudsman reaching decisions on disputed issues.

In a twist on the ombudsman device, parties that have been unable to agree on an IEP can submit their respective versions of an IEP to an agreed third-party expert. The parties must also agree to abide by the expert's final decision on an appropriate IEP. The strategy is different from the ombudsman device in that the ombudsman merely rules on disputed issues (i.e. the parent is right, the school is wrong, or vice-versa) and in the third-party expert device the expert may come up with an IEP independent of the parties' proposals.

These strategies are extraordinary and unique strategies, and they are, however, not without legal risks. In either of the above scenarios, the school is stuck with the decisions of the ombudsman and third-party expert, even if the decision results in an inappropriate program. If the experts come up with an inappropriate IEP, the school still bears the ultimate liability.