

# An Incremental Paradigm Shift in Special Education Dispute Resolution: Early Dispute Resolution (EDR) - Breaking the “Waiting to Fail Model”

By Richard Erhard

The title of this article may raise some eyebrows. Even more so, its content may cause some discomfort to those who are wed to the status quo – the Institutionalized<sup>1</sup> Model of Special Education Dispute Resolution. However, the intent here is to raise awareness and increase the curiosity and motivation of all stakeholders involved in the resolution of special education disputes toward exploration of a viable alternative. In other words, to disrupt a well-meaning process that does not provide a reliable solution to stem the flow of ongoing requests for due process hearings. Nearly twenty years ago, when questioning the effectiveness of the status quo “Institutionalized Model” I asked myself the following questions:

1. Are there options to the current model for the resolution of special education disputes?
2. Are there lessons to be learned from other related disciplines?

To be effective, an alternative dispute resolution model needs to provide an efficient, timesaving, cost saving and humanistic way to address the fact: School districts and parents of children with disabilities are going to disagree over the placement and provision of services for a district’s students and a parent’s child. School districts, use the term, “student”, while parents see their daughter or son... their “child”. From the onset, this discrepancy creates a dynamic of student vs. child...district vs. parent and is therefore a primary issue challenging the provision of a free appropriate public education (FAPE)<sup>2</sup>. The model I propose is a straightforward, “cards face up on the table”, “research-based” and party-centric dispute resolution approach, with the intended outcome of providing educational benefit<sup>3</sup> to the end user, children with disabilities.

The importance of early intervention services to mitigate the effects of disability on a child have been well documented and an integral part of special education practice since its inception in 1975<sup>4</sup>. The Act, reauthorized in 2004,<sup>5</sup> has been modified over the past forty-eight (48) years, yet little has changed regarding the resolution of disputes over placement and services. The regulations implementing the IDEA<sup>6</sup> speak to the importance of “implementing a formal plan for identifying a disability as early as possible in a child’s life”. The implementation of this plan codifies the importance Congress places on specific early intervention services. In addition, the

California legislature finds early education programs for children with disabilities, may significantly reduce the potential impact of many disabling conditions on a child, reduce family stress, societal dependency and institutionalization, as well as saving substantial costs to society and schools<sup>7</sup>. Furthermore, given the importance of early intervention, the IDEA authorizes school districts to utilize special education funds for *Early Intervening Services*, as a proactive measure to assist children at risk, however not yet identified as needing special education.<sup>8</sup>

Early intervention for children with disabilities is supported in both federal and state statutes and codified in their implementing regulations. The efficacy of this approach is demonstrated in the voluminous educational peer-reviewed research in this area. Two such studies, the first supporting early intervention services for children identified with Autism Spectrum Disorder (ASD) and the second for children identified with Specific Learning Disabilities are reported in *Pediatrics*<sup>9</sup>, and in the *Journal of Special Education Apprenticeship* (JOSEA)<sup>10</sup>, respectively. The article in JOSEA is of particular interest and relevance to the EDR model I propose for special education dispute resolution. This article compares two prominent, yet very different assessment models utilized for identification of specific learning disabilities in children. The first, typically referred to as the Discrepancy Model, compares a child's IQ to Achievement and is usually not administered until the child is experiencing significant academic difficulty, usually mid-year during the second grade. Because of the delay in administration, this model has "tongue in cheek", been referred to by some special education practitioners as the "Waiting to Fail Model". The second assessment model, referred to as Response to Intervention (RTI) is an early intervention model, where targeted academic interventions in the general education classroom are implemented as soon as a student is identified as experiencing any academic difficulty. Both studies reinforce the importance of Early Intervention.

Just as the federal and state statutes addressing special education services stress the importance of early intervention services to mitigate the effect of disabilities on children, the same holds true for the early intervention of special education disputes, yet little has changed in the dispute resolution model used in this area. Since 2004, a state or local education agency receiving federal assistance is required to develop and implement procedures allowing parties to resolve special education disputes early, prior to filing a complaint for a due process hearing and to resolve such disputes through a mediation process. These procedures are to be voluntary and not used to deny or delay a parent's right to a due process hearing.<sup>11</sup> In other words, Early Intervention.

Furthermore, as an alternative, a state or local education agency may establish procedures to offer parents and schools that choose not to use the above referenced mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with "an appropriate alternative dispute resolution entity" to encourage the use, and explain the benefits of the mediation process to the parents<sup>12</sup>. This alternative is also authorized under the regulations implementing the IDEA<sup>13</sup> as well as in California, the California Education Code.<sup>14</sup>

However, it is under this same section of the California Education Code<sup>15</sup> where we find the mediation process is institutionalized<sup>16</sup>, therefore requiring more fiscal/human resources and time, than the aforementioned alternative process.<sup>17</sup> Under this section, although filing a due process complaint is not a pre-requisite to mediation, it is, unfortunately, more often the case. Furthermore, filing a due process complaint creates the additional requirement to convene a pre

hearing mediation conference, or “Resolution meeting”, to hopefully resolve the dispute.<sup>18</sup> In California, filing a due process complaint also mandates the Office of Administrative Hearings (OAH), under contract with the California Department of Education (CDE), to schedule and provide mediation and due process hearing services. In other words, implement the “institutionalization” of the dispute resolution process. Unfortunately, even when the parties request mediation absent the filing of a due process complaint, in California, they are required to make their request for “Mediation Only” through OAH, triggering institutionalization.

On the other hand, addressing the dispute through the previously cited and authorized alternative dispute resolution procedure appears to be implemented, at best, on an extremely limited basis. I will note, in my experience, this alternative procedure expedites the dispute resolution process, resulting in lower cost, both fiscal and human, while still containing all the protections offered under the institutionalized process, including the FAPE requirement; specifying that the dispute resolution process be at no cost to the parent.<sup>19</sup>

Over the thirty-four years of my professional career, I’ve observed special education disputes to be increasingly more frequent, complex, and costly (fiscal and human). Nearly twenty (20) years ago I began to seriously question the institutionalized dispute resolution process that I believed districts were required to follow. Subsequently, I have observed a significant escalation in requests for due process hearings that continues to this day.

Mediation procedures were institutionalized with the reauthorization of the IDEA in 1997, and in 2006, new regulations institutionalized the requirement of Resolution Meetings. Since 2006, there have been no significant changes to the institutionalized dispute resolution process and procedures. Therefore, nearly twenty years of institutionalized mediation in special education brings us to a place where it appears the system is ripe for revision.

Early Dispute Resolution (EDR) and/or EDR mediation as I’ve been referring to it in my practice brings us a methodology from the private business sector that answers the need for change in the dispute resolution process being implemented over the past twenty years in special education. “EDR is a new idea now. It allows businesses to quickly put disputes behind them, avoid the cost, distraction, and uncertainty of discovery and motion practice, and preserves business relationships where that’s at issue.”<sup>20</sup>

In the wake of the COVID-19 pandemic, public education agencies were not relieved of their duty to provide a FAPE to students with disabilities. Because in many cases the schools were either shuttered, or limited to providing services on-line, parents of children with disabilities filed complaints in record numbers, seeking compensatory education for learning loss due to a significant interruption to their child’s education. This dramatic increase in court filings taxed the already overburdened institutionalized dispute resolution process in California.<sup>21</sup>

In the spring of 2021, given the increase in filings, the California Legislature recognizing the overburdened system, passed two bills authorizing significant fiscal resources for special education dedicated to the development, training, and implementation of special education dispute resolution practices throughout the state. These immense resources provided the long-needed catalyst for an awakening of special education dispute resolution in California.<sup>22</sup>

There is an alternative to the current model of resolving special education disputes. It is a model based on the longstanding premise in special education of “Early Intervention”. We also take lessons from our business partners, where incrementally, we apply the benefits of the “Early Dispute Resolution” (EDR) process used in the resolution of business disputes, to special

education disputes. Here, the preservation of relationships is of particular interest. Given the resources authorized by the California Legislature, from January 2021, to date, under contract with a California Special Education Local Plan Area (SELPA)<sup>23</sup> as a “an appropriate alternative dispute resolution entity”, my firm provided dispute resolution training to SELPA member staff and parents, and developed a dispute resolution continuum, culminating in mediation procedures, under the authorized alternative mediation process<sup>24</sup>, utilizing EDR basic principles,<sup>25</sup> where each case brought forward resulted in a written mediated agreement. The outcome of this model is a decrease in the incidence of special education due process complaints and the implementation of a successful approach that counters the “Waiting to Fail Model” by resolving special education disputes early in the dispute resolution cycle, and at the lowest possible level.

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**Richard Erhard** is Principal | Founder of the consulting firm, Richard Erhard and Associates, LLC, providing mediation and consultation services focusing on educational disputes. Mr. Erhard’s clients include public school agencies, private parties and non-profit agencies in California and New Mexico. He is currently an Associate member of the American Bar Association and San Diego County Bar Association, Alternative Dispute Resolution Sections. Mr. Erhard serves on the board of directors of the Southern California Mediation Association (SCMA) and has done so since 2017. In 2022, Mr. Erhard assumed the Presidency of the SCMA and is currently the SCMA’s Immediate Past President. In addition to his private dispute resolution practice and membership, past and present, on multiple non-profit Boards, Mr. Erhard is a member of the adjunct faculty at the University of Southern California (USC) Gould School of Law, Center for Conflict Resolution. Here, Mr. Erhard has taught the following courses: Special Education Dispute Resolution; Directed Research; and Mediation Theory and Practice. In January, 2023, Mr. Erhard was inducted into the National Academy of Distinguished Neutrals (NADN).

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<sup>1</sup> See Nancy A. Welsh, *Stepping Through the Looking Glass: Real Conversations with Real Disputants About Institutionalize Mediation and Its Value*, Ohio St. J. on DISP. RESOL. Vol. 19:2 (2004) (describing the effects and implications of institutionalized special education mediation on disputants)

<sup>2</sup> PL 94-142, the Education of All Handicapped Children’s Act, 1975 (The Act requires handicapped children to receive a Free, Appropriate, Public, Education)

<sup>3</sup> Board of Educ. v. Rowley, 458 U.S. 176 (1982) (The Act’s requirement of a “free appropriate public education” is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction)

<sup>4</sup> See *id.* at 2

<sup>5</sup> 20 U.S.C. § 1400

<sup>6</sup> 34 C.F.R. § 300.34(c)(3)

<sup>7</sup> Cal. Ed. Code § 56441(a-g).

<sup>8</sup> 20 U.S.C. § 1413 (2021) (f).

<sup>9</sup> *PEDIATRICS – Official Journal of The American Academy of Pediatrics – Clinical Report | January 1, 2020 - Identification, Evaluation, and Management of Children With Autism Spectrum Disorder – Section 7 Research and Service Needs*

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<sup>10</sup> *The Journal of Special Education Apprenticeship, Vol 5, (1) 2016, Response to Intervention vs. Severe Discrepancy Model: Identification of Students with Specific Learning Disabilities*, Gina Armendariz, Ed.D., & Adrian Jung, Ph.D., California State University, Fullerton

<sup>11</sup> 20 U.S.C. §1415 (e)(1)(2)(A)

<sup>12</sup> 20 U.S.C. §1415 (e) (2) (B) (ii)

<sup>13</sup> 34 C.F.R. § 300.506 (b) (2) (i)(ii)

<sup>14</sup> Cal. Educ. Code § 56500.3(j)

<sup>15</sup> Cal. Educ. Code § 56500.3

<sup>16</sup> Welsh, *supra note 1*

<sup>17</sup> *Supra at note 14*

<sup>18</sup> 34 C.F.R. § 300.510

<sup>19</sup> Cal. Educ. Code § 56500.3(j)(1) (notwithstanding any procedure set forth in this chapter)

<sup>20</sup> See Peter Shumaker, *Early Dispute Resolution – The Basics*, Shumaker, Loop & Kendrick, LLP (2016)

<sup>21</sup> See Richard Erhard, *In the wake of COVID-19: An awakening of special education dispute resolution*, Q&A with USC Gould Lecturer Richard Erhard, USC ADR 2021 Retrospective, ADR Quarterly, Winter 2021.

<sup>22</sup> See *id.* (In light of the increase in complaint filings amid the pandemic, what has been the response from state lawmakers?)

<sup>23</sup> See South County Special Education Local Plan Area, San Diego County Office of Education, San Diego, CA (noting SELPA website promotes dispute resolution continuum and EDR mediation)

<sup>24</sup> *Supra note 14*

<sup>25</sup> Shumaker, *supra note 20*