April 30, 2010

Recommendations of the Dispute Resolution Subcommittee of the South Carolina Special Education Advisory Committee

Introduction

The Dispute Resolution Subcommittee ("DRC") was created to provide recommendations to improve the dispute resolution processes implemented by the State of South Carolina to fulfill its obligations to students with disabilities under the Individuals with Disabilities Education Act ("IDEA"). It was determined that the DRC was needed as a result of concerns raised by parents, advocates, educational professionals and other stakeholders regarding perceived bias in the system favoring school districts as well as concerns that formal dispute resolution processes are inherently reactive rather than proactive.

The DRC is comprised of stakeholders, and membership was granted to those who volunteered to participate. No one was excluded from membership, and meetings were open to all interested participants. The views of the DRC and its recommendations represent a consensus of opinion, but do not represent the views of any individual committee member.

With the concerns raised by stakeholders as it primary emphasis, the DRC has met over the past year to discuss possible improvements to the existing system. Systems in place from other states were reviewed and discussed along with ideas brought forward based on experience with South Carolina's present systems. The DRC recognizes the State's funding limitations in the present economy, and so limited its deliberations only to those improvements the DRC believes are necessary for the State to meet its legal obligations to students with disabilities.

Goals

As its initial step, the DRC identified two specific goals. First, the DRC determined that it should recommend ways to address potential disputes proactively. The DRC unanimously concluded that formal dispute processes, such as due process hearings and state complaints, are best viewed as last resorts. Formal dispute mechanisms, though necessary, are inherently reactive and detrimental to the school-parent partnership. Students inevitably suffer during dispute processes, which are frequently lengthy, because of the tension between parents and local school districts. Moreover, formal dispute processes often do not resolve issues prospectively, only determining what <u>should have been done</u> in the past, not what <u>needs to be done</u> in the future. The DRC therefore formulated recommendations to avoid disputes in the first place or resolve them in their infancy.

Second, the DRC determined that it should examine ways in which to improve formal dispute processes to avoid even the appearance of impropriety when resort to them becomes necessary. Paramount concerns were insuring full access to the processes by all parents, including parents with low-incomes and limited access to attorneys, and insuring that disputes were determined on a level playing field between local school districts and parents.

The following recommendations were generated as a result of discussions focused around the above goals. Some of the DRC's recommendations already have been implemented by the South Carolina Department of Education ("SCDE") through its policy and rule-making authority. Other recommendations require further approval and planning to implement. However, the DRC believes that the majority of its recommendations can be implemented prior to the beginning of the 2010-2011 school year.

Recommendations for Resolving Disputes Proactively

Recommendation #1: Implement on-site monitoring in conjunction with current supervisory and monitoring activities.

DRC members consistently noted areas that cannot be monitored without on-site monitoring, such as compliance with requirements for evaluation of students with disabilities, implementation and formulation of Individualized Education Programs ("IEPs"), and compliance with financial requirements. For example, remote monitoring alone cannot adequately determine whether parents requested special education evaluations prior to the District's acknowledging the request, or whether a District in fact gathered data that it claims forms the basis of IEP components. In addition, remote monitoring cannot verify whether school personnel hired with IDEA funds are doing the job intended to be funded with those monies.[1] Only on-site monitoring can verify such information.

Therefore, the DRC recommends that an on-site monitoring system be implemented immediately to support and enhance the supervisory and monitoring activities currently in place. Specifically, the purpose of on-site monitoring would be to (1) corroborate self-reported data by school districts, (2) monitor areas not effectively monitored by remote monitoring, and (3) monitor compliance in areas that could prevent disputes.

The DRC does not advocate requirements that every district be monitored within a specific amount of time. Instead, the DRC recommends that the SCDE randomly select school districts for on-site monitoring. In addition, the SCDE should be authorized to initiate on-site monitoring where it has received information, through any available sources, suggesting systemic non-compliance or where outcomes for students with disabilities are poor. Improving outcomes is a critical component of dispute resolution because virtually every dispute has its genesis in a poor educational outcome.

When monitoring districts suspected of systemic noncompliance or where outcomes are poor, the SCDE should focus on three areas the DRC has identified as likely to reduce the chances for disputes between parents and school districts and improve outcomes.

[1] The consensus of the committee is that this system fails to meet the states obligation to monitor compliance. This position is further supported by a recent OSE letter to the state of Ohio, which found Ohio's monitoring system insufficient, in part, because of Ohio's reliance of self-reporting from local school districts.

The first area is parental participation. Congress has expressly found that parental involvement improves outcomes for children with disabilities. The DRC concurs, and believes that the SCDE therefore should monitor compliance with areas of IEP development that require direct parental involvement. Critical areas of concern include parental involvement in the development of functional behavioral assessments ("FBAs") and implementation of behavioral intervention plans ("BIPs") as they relate to poor outcomes for students with disabilities, including suspension and expulsion of students with disabilities.

Information provided by parents is critical to formulating FBAs and BIPs. Information gathered from the classroom and other school environments is equally important. However, the overwhelming evidence gathered through reports of parent complaints, recent public comments from parents, and information provided by stakeholders is that FBAs and BIPs frequently are drafted without sufficient information gathered from the home and school environment.

The failure to gather this necessary information often leads to poorly developed IEPs and misunderstandings between parent and school, resulting in disputes and poor student outcomes. In addition, parents are disenfranchised when not meaningfully included in this process, arguably depriving them of their right to participation in the IEP process.

The second area is implementation of the IEP. Disputes often originate from an alleged failure of a school district to implement the student's IEP, including direct services, related services, FBAs, and BIPS. It is critical that the SCDE ensures not only that Districts draft legally compliant IEPs, but that those IEPs are appropriately implemented, monitored, and adjusted.

The current supervisory and monitoring processes do not adequately capture whether school districts are collecting sufficient and meaningful information to formulate FBAs and BIPs, nor does it adequately capture whether all necessary related services are being documented in IEPs and monitored for efficacy by local school districts. Moreover, the data collected does not reflect whether IEPs are being implemented as written. Therefore, it is imperative that on-site monitoring be reinstated as soon as possible to ensure compliance in these areas.

The third area is service to high-risk youth. Students served through medical homebound, home-based programs, interim alternative educational settings, alternative schools, residential treatment facilities ("RTFs"), and other non-traditional school environments are at heightened risk for poor outcomes. Data provided by Districts related to these students may not be as reliable, or may be non-existent, because these students may be served away from traditional school facilities. Therefore, the DRC recommends that the SCDE conduct on-site monitoring to ensure compliance with regard to these students, specifically in the areas of child find, timely evaluation, and instruction by appropriately certified and highly qualified personnel.

Recommendation #2: Continue facilitated IEPs and other alternative dispute mechanisms.

The SCDE previously implemented a facilitated IEP project in pilot districts. By all accounts, this program has been a success and plans exist to expand it. This program has resolved disputes while minimizing damage to the parent-school relationship and, in some cases, helping to rehabilitate it. The DRC recommends that this program be continued and expanded.

Also, training hearing officers to serve as mediators should be considered to help make mediation a more helpful option. A hearing officer serving as a mediator would be in a unique position to assist the parties in resolving their disputes. Of course, a hearing officer who mediates a case would not be permitted to hear the case.

Recommendations for Improving Formal Dispute Processes

Recommendation #3: Revise two-tier due process hearing system.

Many concerns have been raised regarding the current two-tier hearing system, in which Local Hearing Officer ("LHO") decisions are reviewed by a State Review Officer ("SRO"). Specifically, many stakeholders questioned the reason why so few due process decisions have been in favor of parents. Stakeholders also raised concerns about the manner in which hearing officers are selected, with LHOs being selected and compensated by school districts. Further concerns were raised about the lack of a separate roster of LHOs and SROs, resulting in hearing officers reviewing one another's decisions.

The DRC considered several options for improving the current due process system, including the advantages and disadvantages of moving to a single-tier system and/or using administrative law judges ("ALJs") as hearing officers. However, the DRC at this time recommends that the current two-tier system remain in place with some modification.

With regard to ALJs, it was decided that using ALJs would result in missed timelines required by the IDEA because of ALJ current caseloads. In addition, ALJs would require the same additional training as current hearing officer candidates, and may not be receptive to additional caseload responsibilities. Simply put, the DRC did not see any advantage to using ALJs, and identified several disadvantages.

With regard to the single tier system, the DRC identified several advantages and disadvantages associated with this system. Among the advantages were a speedier resolution at the state level and the need for fewer hearing officers. Among the disadvantages was the requirement of an appeal immediately to federal court, which would require parents to pay a significant filing fee and be at an extreme disadvantage without an attorney. Given the DRC's extreme concern with full access to the system by parents, it was determined that the two-tier system is preferable because it permits parents an avenue to appeal without the cost and procedural complication of filing a federal court action.

Having decided the two-tier system is preferable, the DRC developed several recommendations for revising the current system. **First, the DRC recommends that a separate roster of LHOs and SROs be maintained.** It is the understanding of the DRC that the SCDE is currently assigning hearing officers in this way, but this practice needs to be formalized. Moreover, this will require expanding the current roster of hearing officers, and it is the DRC's understanding that the SCDE already is undertaking additional training to provide sufficient hearing officers for such a requirement.

Second, the DRC recommends that LHOs be selected on a rotating basis, rather than being chosen at the discretion of the school districts. Currently, LHOs are selected and compensated by school districts, creating at least the appearance of bias. This should be rectified by creating a system as soon as possible in which LHOs are assigned on a rotating basis. The DRC has been informed that there is some logistical difficulty with implementing this change based on positions taken by the South Carolina Attorney General regarding payment of hearing officers. Specifically, there is some question whether hearing officers may be paid at the current rates and whether they must be approved by the Attorney General's office. If this is indeed the case, the DRC recommends that the SCDE immediately take the appropriate steps to resolve the issue with the Attorney General's office. Alternatively, the SCDE must find a way to recruit hearing officers to meet state procurement laws without violating the IDEA and due process.

Third, the DRC recommends due process decisions be posted on the internet within ninety days of the decision. This is necessary for transparency as well as helping make the established body of case law interpreting IDEA in the state readily accessible to everyone. Again, the SCDE is currently doing this, but the practice should be formalized.

Fourth, the DRC recommends that a formal evaluation process for hearing officers be implemented. Currently no formal process exists for hearing officers to be evaluated. This process should mirror the evaluation process for judges in South Carolina, in which lawyers are asked to complete evaluations based on the performance of judges. In addition, the SCDE should review all decisions of hearing officer to ensure that the quality of the work performed by the hearing officer meets the requirements of the IDEA and due process. The SCDE should have the authority to remove any hearing officer whose work does not demonstrate an understanding of the IDEA and its requirements. For example, a hearing officer who fails to meet the IDEA timelines or does not conduct himself or herself in a professional manner should be removed from the roster. However, the SCDE should <u>not</u> have the authority to remove a hearing officer merely because the SCDE disagrees with a hearing officer's ruling or otherwise be permitted to interfere with the hearing officer's independence.

Fifth, the DRC recommends that hearing officers be required to attend training on at least an annual basis, and that requirements for initial training be formalized.

The DRC recommends that the requirements for initial hearing officer training be formalized. It is further recommended that the SCDE conduct training on an annual basis for hearing officers. The subject matter to be covered during training should be set forth in sufficient detail to inform the public as to how hearing officers are trained. In addition, it is recommended that the SCDE implement a mentoring process to assist new hearing officers in their first hearings or reviews. In

addition, hearing officers should be required to attend at least annual training. The annual training should include training on recent developments in the law and provide ongoing training regarding the disabilities that fall within the IDEA eligibility categories.

Recommendation # 4: Findings of potential systemic noncompliance should trigger an on-site investigation by the Office of Exceptional Children ("OEC").

Parents and stakeholders have raised serious concerns involving circumstances where districts have been found to have denied FAPE or otherwise not complied with the IDEA through due process or the formal complaint process, but systemic violations continue to occur. It is the SCDE's obligation to ensure that local school districts remedy both violations as to individual students as well as systemic violations that may be occurring. Moreover, it is the SCDE's obligation to ensure instances of noncompliance are corrected as soon as possible but in no case later than one year after the noncompliance is identified.

The DRC recommends that any instances of potential systemic noncompliance, identified from any source, should trigger an on-site investigation by the OEC to identify issues of noncompliance and order immediate corrective actions. The OEC should report its findings of any on-site investigation related to potential systemic noncompliance to the Advisory Council on an annual basis. The OEC's report should include the systemic issues investigated, investigative activities undertaken, findings as a result of the investigation, and any follow up action taken as a result.

Conclusion

After considering the current formal dispute resolution processes in South Carolina for more than a year, the DRC has reached the conclusion that the systems of formal dispute resolution are inadequate to monitor and correct all issues of noncompliance. Specifically, the DRC concluded that procedures need to be in place to proactively identify issues related to noncompliance and poor performance of students with disabilities. Moreover, the DRC has concluded that the recommendations made by the committee could improve the process for parents of children with disabilities who wish to avail themselves of formal dispute resolution processes. The DRC believes that on-site monitoring and improved dispute resolution processes will improve outcomes for students with disabilities in South Carolina over time.

The DRC therefore recommends the Special Education Advisory Council review and consider the recommendations for implementation at the start of the 2010–11 school year. While some of the recommendations may require additional resources and related funding, most of the recommendations should not require additional funds and are capable of immediate implementation. These recommendations are based on the information provided to the committee members by other stakeholders, the SCDE, the personal experiences of the committee members and common principles of fairness and justice. The DRC stands ready to provide clarification and assist in any way throughout the process.