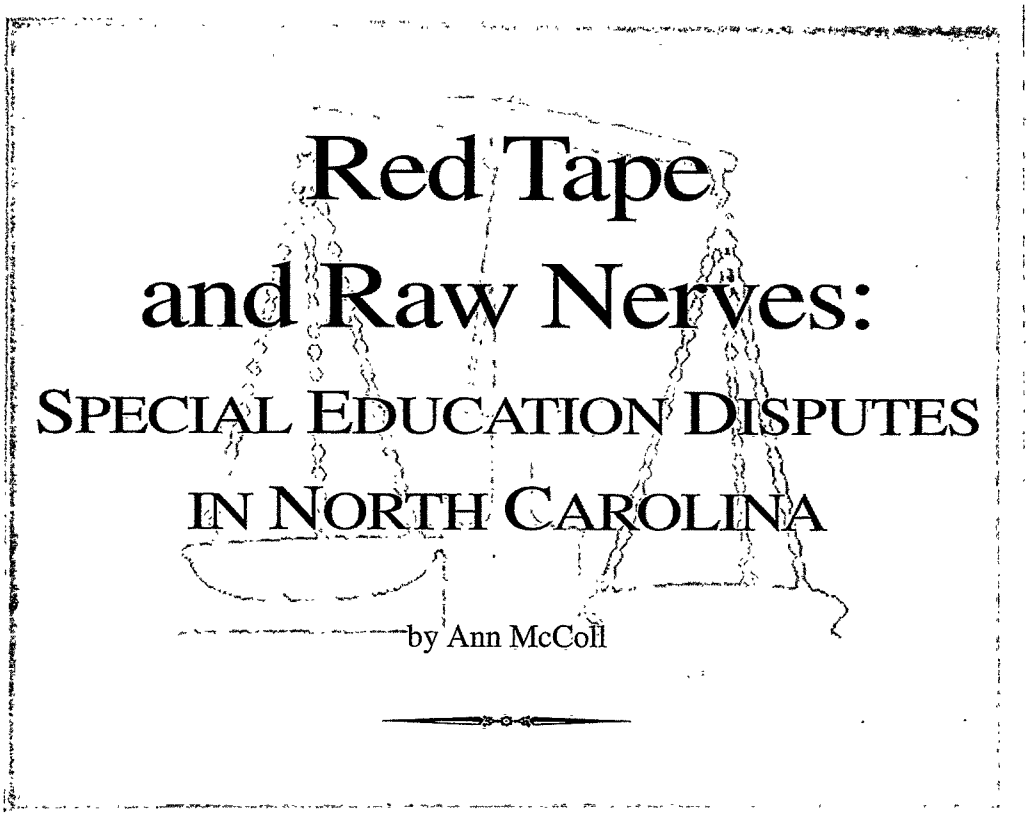

Red Tape and Raw Nerves:

SPECIAL EDUCATION DISPUTES IN NORTH CAROLINA

by Ann McColl

Summary

North Carolina's dispute resolution process regarding exceptional children comes into play when parents have a concern about their child's special education placement in the North Carolina public schools that cannot be resolved through other means. In this article, the Center takes an in-depth look at the dispute process and finds the system to be time-consuming, adversarial, and expensive to both school systems and parents. In cases that end up in litigation, federal law envisions a final resolution within 45 days. The state's Office of Administrative Hearings meets this standard in only about 10 percent of its cases. Due to the complexity of the cases and other factors, these disputes often take more than a year to resolve. Meanwhile, the child is held in his or her current educational placement until the issues at stake are settled. The Center advocates a series of reforms that would smooth the process and better serve the needs of the child.

Two hypothetical cases are examined: Stuart, who has a learning disability that interferes with his ability to process math concepts, and Michael, a teenager with behavioral and emotional disabilities. The two cases illustrate the kinds of issues that can escalate into formal complaints or hearings over how best to serve the needs of the child. While hypothetical cases are used due to student confidentiality issues, these cases are based on situations actually seen in North Carolina and elsewhere.

The right to a free and appropriate public education for children with disabilities is of fairly recent vintage. Indeed, the 1965 General Assembly passed a law that took the opposite position. "A child so severely afflicted by mental, emotional, or physical incapacity as to make it impossible for such a child to profit by instruction in the public schools shall not be permitted to attend the public schools of the state," the law stated. "If the parent or guardian of such a child persists in forcing his attendance after such a report has determined that the child should not attend the public schools, he shall be guilty of a misdemeanor and upon conviction shall be punished at the discretion of the court."

State law changed in 1974 to give every child the right to an education in the public schools, and federal law changed soon thereafter. Today, every child has the right to a free and appropriate public education in the least restrictive environment possible for that child. This guarantee has changed the way children with special needs are educated and led to legal wrangling between parents and educators over what constitutes an appropriate educational placement for the special needs child. Parents have the right to due process hearings under certain circumstances when their complaints cannot be resolved by other means, and in North Carolina, those hearings are conducted by the Office of Administrative Hearings. The hearings are a form of civil litigation, and all rules of evidence apply. More than six times as many requests for due process hearings were filed in 1997 as in 1989, with 74 requests out of a population of 159,697 students, a ratio of one claim for every 2,158 students with identified disabilities. This compares to a ratio of one in every 9,713 students with identified disabilities in 1989.

Since 1992, almost eight of every 10 cases have been resolved before a decision is made by an administrative law judge. The majority (57 percent) of the cases resolved before a decision are withdrawn, voluntarily dismissed, or dismissed by an administrative law judge as deficient in some respect; an additional 21 percent are settled or a consent order is entered. A final decision is rendered in the remaining cases. Although these decisions are subject to appeal, most are not. Of 39 final decisions rendered from 1992 to 1997, only 12 were appealed for further review. There are no legal consequences for the parties involved in the dispute if the case is not concluded within 45 days, and extensions are routinely requested at the request of either party. Some 30 percent of the cases have taken more than a year to decide.

In addition to ***due process hearings****, parents may use a* ***formal complaint process*** *within the N.C. Department of Public Instruction to address some of their concerns. Whereas due process hearings require discovery procedures and witnesses, formal complaints may require only a review of documents, although on-site investigations also can be conducted when necessary. The number of formal complaints filed with the Department of Public Instruction over the past five years has ranged from 59 in 1993–94 to 43 in 1997–98. A decision on a submitted complaint must be reached within 60 days, absent exceptional circumstances. The Department of Public Instruction usually meets or just misses the 60-day requirement. In the 1996–97 fiscal year, for example, 30 of 49 cases were resolved within the 60-day time limit, while 35 of 49 (71.2 percent) were resolved within 70 days.*

Yet another means of resolving disputes is ***mediation****. In a study conducted for the U.S. Department of Education, at least seven states that collect data on mediation programs — Arizona, California, Colorado, Illinois, Massachusetts, Minnesota, and Vermont — reported high rates of conflict resolution (at least*

80%). Information collected by the Minnesota Department of Education found that 96 percent of mediation participants in special education disputes would use mediation again and would recommend it to others.

The law requires the state to maintain a list of qualified and trained mediators. More than 50 mediators have been trained by the N.C. Department of Public Instruction and the Institute of Government at the University of North Carolina at Chapel Hill. In April 1998, the Department of Public Instruction notified local school districts that these mediators are available, but no information has been collected thus far on whether the new mediation process has been used or on its effectiveness. Some state departments of education aggressively advocate the use of informal dispute resolution such as mediation. These include Michigan and Illinois, which has trained mediators on staff.

Communication between parents and educators is key to avoiding disputes and resolving them quickly once they occur. A program that has worked effectively in the San Diego Schools is the deployment of ***parent facilitators****. The program hires parents of special needs children and provides extensive training to them. Facilitators help parents find resources, link parents with other parents with similar issues and concerns, provide information about rights and the educational process, and accompany parents to meetings to discuss the child's education plan.*

Yet another option that prevents special education disputes is ***conflict resolution*** *training. In Michigan, the Community Dispute Resolution Program and the Michigan Special Education Mediation Program regularly provide training on conflict resolution. In North Carolina, all special education directors in the state have received mediation training. In addition, some school districts provide training for staff, such as the Lee County Schools. However, currently there is no organization providing training to parents and staff on a systematic basis in North Carolina.*

The Center's research on dispute processes in special education leads to two firm conclusions: due process disputes should be resolved on a more timely basis, and North Carolina needs a more fully developed continuum of dispute resolution options so that fewer cases get to the formal due process hearing stage. In California, grants are given to regional education agencies for creating their own continuum so that programs may be developed that best suit local needs.

Two clear lessons from the Center's research are that due process hearings should be resolved on a timely basis, and that a variety of approaches should be developed and deployed to avoid these divisive, expensive, and time-consuming hearings. Given these findings, the Center offers two recommendations: (1) The Office of Administrative Hearings should resolve due process hearings on a timely basis, with a goal of reaching a decision in the majority of these cases within the 45-day period established in federal law. Further, the Office of Administrative Hearings and the Department of Public Instruction should be required to report annually to the legislature's Government Operations Committee on progress in improving performance on this standard; (2) The Superintendent of Public Instruction and the State Board of Education should create a task force in 1999 that brings together representatives in the various dispute processes to evaluate options and make recommendations to the N.C. General Assembly by the year 2000 toward the development of a continuum of dispute processes in North Carolina. The goal of the continuum to be developed by this task force would be to reduce the number of dispute process hearings by providing more opportunities to resolve conflicts before they reach the litigation stage.

A child so severely afflicted by mental, emotional, or physical incapacity as to make it impossible for such a child to profit by instruction in the public schools shall not be permitted to attend the public schools of the state.

—1965 N.C. LAW

Imagine a nine-year-old named Stuart with a learning disability that affects the way he processes math concepts. His school has responded by providing Stuart with group tutoring sessions for children who have similar learning disabilities. Stuart's parent is not satisfied with his progress since the tutoring began and wants the school to provide an individual tutor to be with Stuart during the math class. The school team does not think the school can afford to have an assistant in the classroom just with Stuart and has told Stuart's parent that, given a reasonable period of time, Stuart's needs will be addressed through the tutoring sessions. As the parent's frustration builds, the parent begins to view the educators as arrogant and callous. The educators, in turn, start to perceive the parent as unreasonable and inflexible.

Now think of a 13-year-old — let's call him Michael — with behavioral and emotional disabilities. He does not control his anger and has repeatedly hit and verbally abused other students and teachers. The principal is getting numerous complaints about Michael from other parents. The school team plans to remove Michael from the regular classroom setting and place him in a contained classroom with limited interaction with other students. Michael's parents do not want Michael removed and believe that Michael's behavior can be controlled in the regular classroom if the teachers have the right training and use appropriate interventions. The pressure to maintain a safe environment is creating mounting tension between the school, Michael's parents, and other parents and students in the school community.

How will these disputes be resolved? The answer lies in a web of federal and state laws and regulations that establish requirements for serving children with disabilities. The answer also lies in the skills and knowledge of the parties in using conflict resolution techniques to avoid the need for litigation. This article explores how North Carolina has responded to legal requirements for due process procedures for parents, and it provides recommendations for a more comprehensive approach to dispute resolution that would mean less litigation, less expense for both parents and school systems, and better relationships between the parties in dispute. In addition, parents and school systems could settle their differences more quickly, which would benefit the child caught in the middle of the dispute.

Legal Requirements

The right to a free and appropriate public education for children with disabilities is of fairly recent vintage. Indeed, the 1965 General Assembly passed a law that took the opposite position. "A child so severely afflicted by mental, emotional, or physical incapacity as to make it impossible for such a child to profit by instruction in the public schools shall not be permitted to attend the public schools of the state," the law stated. "If the parent or guardian of such a child persists in forcing his attendance after such a report has determined that the child should not attend the public schools, he shall be guilty of a misdemeanor and upon conviction shall be punished at the discretion of the court."[1]

That posture toward disabled children changed drastically with the N.C. General Assembly's passage of the Equal Education Opportunities Act of 1974 and passage of the federal Education for All Handicapped Children Act of 1975. The North Carolina law specified that "no child shall be excluded from service and education for any reason whatsoever."[2] The federal act couples substantive rights to education and related services with procedural protections to provide parents with an ability to enforce those rights. The law, later reauthorized as the Individuals with Disabilities Education

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Act (IDEA), was enacted in response to congressional findings that children with disabilities were given inadequate services to address their special needs or were excluded entirely from the public schools.

The IDEA requires certain conditions to be met in order for states to receive federal funding that is passed on to local education agencies (school districts or "LEAs") for serving students with certain mental, physical, or emotional disabilities. These children are referred to in North Carolina law as children with special needs. As a procedural protection, parents may challenge the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") to a child.[3] For example, a parent of a child with a learning disability may challenge the sufficiency or types of services provided to the child. Or a parent may seek to have a child with disabilities spend more time with non-disabled peers in the classroom and during non-instructional activities.

Federal law specifies the types of mediation and due process hearings that must be made available. Federal regulations also require states to provide a formal complaint process as part of their activities for monitoring compliance. States have flexibility in designing dispute processes so long as the federal requirements are met. So far, the Office of Special Education Programs in the U.S. Department of Education has accepted how North Carolina has met the federal requirements. (See Table 1 following.)

While the focus of this article is on the effectiveness of dispute processes when parents want to contest school decisions, local education agencies also can utilize due process procedures to assert their rights to serve the child. LEAs also may seek intervention by hearing officers or the courts in order to change the placement of a child for a limited period of time based upon safety concerns.

No child shall be excluded from service and education for any reason whatsoever.

—1974 N.C. LAW

Karen Tam

Table 1. Federal Requirements for Mediation and Due Process with Corresponding N.C. Dispute Processes

Federal Requirements for Mediation and Due Process	North Carolina Dispute Processes
Mediation at the expense of the state must be made available, at a minimum, whenever a due process hearing is requested. *20 U.S.C. 1415(e)*	Informal mediation is available prior to filing a request for formal administrative review with the consent of both parties. The mediator is selected by the parties: the Exceptional Children Division of the Department of Public Instruction maintains a list of qualified mediators. *G.S. 115C-116* Mediation after the filing of a due process hearing request is available in the Office of Administrative Hearings. The administrative law judge assigned to the case may require parties to attend a mediated settlement conference. *G.S. 150B-23.1*
An impartial due process hearing must be conducted by the local education agency or the state education agency with a decision within 45 days after receiving the complaint unless specific extensions are granted. *20 U.S.C. 1415(f), 34 C.F.R. 300.512*	Due process hearings are conducted and a final decision is rendered by an administrative law judge of the Office of Administrative Hearings. *G.S. 115C-116(d)-(h)*
Appeal of due process hearing to the state education agency must be allowed if the hearing is conducted by the local education agency with a decision made within 30 days. *20 U.S.C. 1415(g), 34 C.F.R. 300.512*	Decisions of the administrative law judge may be appealed to a review officer appointed by the State Superintendent of Public Instruction. *G.S. 115C-116(I)*
Civil action may be brought in state court or federal district court by any aggrieved party. *20 U.S.C. 1415(I)(2)*	Civil actions are brought in North Carolina state court or federal court. *G.S. 115C-116(k)*

Federal Requirements for Formal Complaints	North Carolina Complaint Process
The state agency shall provide a complaint procedure which includes on-site investigations if necessary and a written decision within 60 days absent exceptional circumstances. The agency's decision is appealable to the U.S. Secretary of Education. *34 C.F.R. 300.660-662*	The Division of Exceptional Children in the Department of Public Instruction conducts investigations of formal written complaints. *Public Schools of North Carolina,* Handbook on Parents' Rights, *November 1997.*

North Carolina's Experience with Due Process Hearings

States are required to provide impartial due process hearings. By federal law, the hearing must provide the parents and the school district with the right to consult with counsel and specialists; the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; and the right to a record of the hearing and findings of fact and decisions.[4] These rights suggest a lengthy process, but federal regulations also require that the hearing officer (in North Carolina, an administrative law judge) render a decision within 45 days of receiving the complaint unless specific extensions of time have been granted at the request of either party.[5]

Since 1989, the N.C. Office of Administrative Hearings (OAH) has served as the hearing officer for special education disputes. Special education disputes are addressed in the same manner as other issues heard in the office. The North Carolina Rules of Civil Procedure and the North Carolina Rules of Evidence apply, meaning that all the rules regarding how evidence is collected and testimony offered that are used in formal court settings also are used in these disputes.[6] While using rules designed for formal proceedings can make a process more elaborate, the administrative law judge has considerable discretion in controlling the nature of the hearing, including the authority to "regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents."[7]

The Office of Administrative Hearings has maintained data on due process hearing requests since 1989. Most of the analysis below is based on requests filed beginning in 1992 since there was a shift in 1992 to change the administrative law judge's decision from a recommendation to a final decision appealable to a review officer.[8]

Cases Filed

More than six times as many requests for due process hearings were filed in 1997 as in 1989. (See Table 2.) While this is a substantial increase, the number of requests is small relative to the size of the population served in North Carolina schools. In 1997, there were 74 requests for a due process hearing made from a total of 159,697 students with identified disabilities for a ratio of one claim for every 2,158 students. Some of the state's school districts have never had a due process hearing request, while others regularly face hearings. Durham County alone accounted for 29 of the 74 cases (34 percent) filed in 1997.

The increase in requests is consistent with the national trend, though more dramatic. Although some states had a decrease in hearing requests from 1992 to 1995, overall, the number of requests increased nationally each year by 7.5 percent.[9] (See Table 3.)

How Cases Are Resolved

Since 1992, almost eight of every 10 cases have been resolved before a final decision is made by the administrative law judge. (See Table 4.) The majority (57 percent) of the cases resolved before a decision were withdrawn, voluntarily dismissed, or dismissed by the administrative law judge as deficient in some respect. Twenty-one percent of the cases were settled or a consent order was entered. Administrative law judges rendered final decisions in 21 percent of the cases. Cases that have been withdrawn or dismissed signal that

Table 2. Due Process Hearing Requests in North Carolina Public Schools By Year, 1989–1997

Year	Cases Filed	Special Education Population in N.C. Public Schools
1989	12	116,556
1990	6	120,434
1991	2	125,364
1992	17	130,599
1993	25	135,087
1994	28	139,803
1995	31	147,313
1996	48	152,819
1997	74	159,697

Source: N.C. Office of Administrative Hearings for numbers of cases, N.C. Department of Public Instruction for special education populations.

Table 3. Number of Due Process Hearing Requests Filed in Public Schools in the U.S., 1992–1995

Year	Hearings Requested	Growth in Number of Hearings Over Prior Year	Percent Increase	Number of States with Increase	Number of States with Decrease	States Remaining the Same
1992	4,323	198	4.8%	29	16	0
1993	4,781	458	10.6	24	22	0
1994	5,321	540	11.3	36	5	4
1995	5,497	176	3.3	27	18	2
Average	**4,981**	**343**	**7.5**	**29**	**15**	**1.5**

Source: Due Process Hearings: An Update, National Association of State Directors of Special Education, Alexandria, Va., 1997. Number of states does not add to 50 due to incomplete reporting.

some agreement has been worked out between the parties or that a decision was made by the parent not to go forward with the claim, regardless of whether the issue in dispute had merit or was sufficiently addressed.

Most decisions of an administrative law judge are not appealed to a review officer. Of the 39 final decisions rendered from 1992 to 1997, only 12 (31 percent) were appealed for further review.

How Long It Takes To Reach a Decision

While federal regulations require final decisions to be made within 45 days absent specific extensions granted by the hearing officer, decisions are made within this time frame in only about 10 percent of cases. (See Table 5, p. 54.) There are no legal consequences for the parties involved in the dispute if the case is not concluded within 45 days, and extensions are routinely granted at the request of either party. Some 30 percent of the cases have taken more than a year to decide. Administrative law judges typically take longer to reach a final decision in cases that are appealed than in cases in which the administrative law judge's final decision is not appealed. This may suggest that the more difficult or complex cases are the ones that are appealed.

Half of the cases that were resolved by withdrawal or dismissal (voluntary withdrawal by the parents or dismissed by the administrative law judge) occurred within the first 90 days from when the case was filed. (See Table 6.) Although the withdrawals or dismissals may reflect some sort of agreement between the parties, the agreements in the form of settlements and consent orders appear to take longer, with the vast majority (82 percent) occurring between three months and one year from the date of filing.

Table 4. Resolution of N.C. Special Education Disputes, 1992–1997

How Cases Are Resolved	Number	Percentage*
Withdrawn, dismissed voluntarily, or dismissed by Administrative Law Judge	104	57%
Settled or consent order	39	21
Final decision by Administrative Law Judge	39	21
	182	

*Percentages do not total 100 due to rounding.

No Patterns Over the Years in the Amount of Time Needed To Resolve Cases

There is no clear pattern in the amount of time taken to resolve cases since 1992. From one year to another, the cases fluctuate in whether they have been resolved more quickly or slowly than the preceding year. (See Table 7, p. 56.) The proportion of cases resolved in 45 days has not improved from 1992 to 1997. There is still one case pending that was filed in 1996, and there are 39 cases filed in 1997 that were still open as of May 1, 1998 — well beyond the 45 day federal time limit.

Assessment of the Costs, Efficiency, and Effectiveness of Due Process Hearings

A process that routinely goes beyond 45 days appears to be contrary to the intent of the federal law and regulations. There are other results as well. Attorneys representing parents and students assert that a process that is complex and lengthy is inaccessible to most parents. "When you hear one of these cases, it is painful to see the raw nerves caused by the case," says Tom West, a former administrative law judge and now an attorney and mediator. "With all the money spent in litigation, you think how many teachers could have been hired or mortgages paid."

Frank Johns, a private attorney who represents parents and students, says that he consults with hundreds of parents each year and warns them of the potential cost if attorney fees are not paid by the school district and of the amount of time they may need to be away from work. Deborah Greenblatt, executive director and attorney for Carolina Legal Assistance — A Mental Disability Law Project, says that even though the law may provide extensive procedural protections, low or moderate income parents have no process available to them as a practical matter. Without a lawyer, Greenblatt notes that it is very difficult for parents to be on a level playing field with a school district that has education expertise and is represented by an attorney.

While low cost and efficiency are important in order to make the process more accessible, the most critical reason for reducing the time spent in these hearings is the child. The child's education is on hold while the hearing takes place. By law, the child must remain in the current educational placement during the hearings unless the parties agree otherwise. Yet, the child and his or her needs often continue to change. If the changes are introduced as evidence, the dispute becomes a constantly shifting array of legal and educational issues. The issues that caused the dispute might not even be relevant by the time the decision is rendered.

"When you hear one of these cases, it is painful to see the raw nerves caused by the case. With all the money spent in litigation, you think how many teachers could have been hired or mortgages paid."

—TOM WEST, FORMER ADMINISTRATIVE LAW JUDGE, NOW AN ATTORNEY AND MEDIATOR

There are a number of factors that contribute to the lengthiness of these hearings. Various participants in the process say these disputes are a blend of the complexity of medical malpractice cases and the emotional intensity of domestic cases. The complexity is apparent in the way the cases are prepared and presented. Under the regular rules of civil procedure that are employed in these cases, discovery can become virtually unlimited with extensive interrogatories, depositions, and record requests. Ann Majestic, attorney for several school districts, says that cases often are becoming a battle of expert witnesses brought in from across the country. The use of experts drives up the cost, length, and complexity of the cases.

The emotional side of a dispute also can lengthen the proceedings. Parents especially may want to vent their frustrations by telling the full story to an impartial observer. Former administrative law judge Tom West identifies the tension between providing a full hearing and an affordable hearing. "Parties might want to have a Cadillac lawsuit on a Chevrolet budget . . . there needs to be a balance between the need to tell the story with the reality of most people's budget."

Stuart's case requires a complex and lengthy trial. Experts discuss Stuart's particular difficulties in processing math concepts and the value of the school's group tutoring sessions versus his parent's desire to have an individual aide during the class. There are issues of law as to whether the choice to use tutoring sessions is "educational methodology" and therefore is a decision to be left to the school or whether the use of group tutoring

Table 5. Time Required To Decide N.C. Disputes, 1992–1997

Length of Time	Final Decisions Not Appealed	Final Decisions Appealed	Total	Percentage of Total*
Up to 45 days*	4	0	4	10%
46 to 90 days	7	1	8	21
91 to 180 days	4	2	6	15
180 to 365 days	7	2	9	23
Over 365 days	5	7	12	31

* Federal law requires decisions to be made within 45 days.

Source: N.C. Office of Administrative Hearings, Raleigh, N.C.

is denying Stuart a "free appropriate public education." The parent goes into a lengthy explanation of the child's history, in part because the parent did not feel respected or heard by the educators.

Michael's case also leads to lengthy legal disputes. The school district avails itself of processes to remove the child from the regular classroom setting temporarily based upon safety concerns. The due process hearing includes extensive testimony regarding the nature of Michael's behavioral and emotional disability and whether there are interventions the school district could have tried that would have helped Michael control his behavior in the regular educational setting. The legal issues regarding whether a self-contained classroom for Michael is the "least restrictive environment"[10] — the environment most like a regular classroom setting possible given his educational needs — also are complex and require each side to be represented by an attorney to argue the issues, thus driving up costs, lengthening the process, and adding to friction between the parties.

Parents' Option of Using Formal Complaints

In addition to due process hearings, parents may use a formal complaint process with the N.C. Department of Public Instruction to address some of their concerns. Federal regulations require each state to have a process for receiving, investigating, and responding to complaints by parents.[11] The complaint process stands in contrast to due process hearings. Whereas the due process hearings require discovery procedures and witnesses, formal complaints may require only a review of documents, although on-site investigations also can be conducted when necessary. The number of formal complaints about special education filed with the Department of Public Instruction has been fairly consistent over the past five years, ranging from 59 in 1993–94 to 43 in 1997–98.[12] (See Table 8, p. 58.)

Priscilla Maynor, consultant for due process and parents' rights with the Exceptional Children's Division, says that while the number of complaints has been relatively steady, the nature of the complaints has changed. Complaints used to be primarily regarding procedural irregularities that could be identified on paper — like not getting the proper signatures for an individualized education program. Now, she says, the complaints often are more complex and are more related to concerns about programs the child should be receiving. More complaints are addressing failure to implement agreed-upon services such as speech therapy, occupational therapy, or physical therapy.

If a local school district is found to be out of compliance with federal requirements, the N.C. Department of Public Instruction requires the school district to address the issue for the particular child and how it will ensure that any systemic problems have been resolved. For example, if a school district was not providing speech therapy services because of the scarcity of speech therapists, the remedy for a particular child would be to begin providing the services and any compensatory

Table 6. Time Spent Deciding N.C. Special Education Disputes By Outcome of Case, 1992–1997

Length of Time	Withdrawals/ Dismissals	Settlement/ Consent Orders	Totals	Percentage of Total
Up to 45 days	27	0	27	19%
46 to 90 days	25	4	29	20
91 to 180 days	21	18	39	27
181 to 365 days	20	14	34	24
Over 365 days	11	3	14	10
Totals	105	39	143	

Source: N.C. Office of Administrative Hearings, Raleigh, N.C.

services needed for the child. The response to the systemic issue would include notifying other parents of children whose services may have been affected by the violations found.

A decision on a submitted complaint must be reached within 60 days, absent exceptional circumstances. The Department of Public Instruction usually meets or just misses the 60-day requirement. (See Table 9, p. 59.) In the 1996–97 fiscal year, for example, 30 of 49 cases were resolved within the 60-day time limit, while 35 of 49 (71.2 percent) were resolved within 70 days. Maynor says that exceptional circumstances have justified delays when on-site investigations must be conducted, or when additional documents are submitted by the parents or the school and the other party must be given the opportunity to respond.[13]

Maynor notes that many parents would like to use the complaint process rather than seek due process hearings because the complaint process is quicker, simpler to use, and less costly. The complaint process also does not necessitate hiring an attorney to protect legal interests. However, the complaint process cannot address many of the issues raised in due process hearings, such as the appropriateness of the education plan or services, says the Department of Public Instruction in its interpretation of what federal law allows complaint processes to address. Thus, even though parents might want to address their concerns through the complaint process, the due process hearing may be the only avenue for resolving the legal issues raised. For example, the formal complaint process could not be used to determine whether providing Stuart with group tutoring sessions rather than an individual assistant was adequate. For Michael, the complaint process might be helpful if there were procedural irregularities in any disciplinary action taken for his hitting students and the teacher, but it would not be able to address whether certain interventions would be sufficient for Michael to remain in the classroom.

Another impediment to using the process is simply lack of awareness of the process and how it works. The complaint process is specified in federal regulations. It does not appear in state or federal law. The *Handbook on Parents' Rights* created by the Department of Public Instruction provides a brief description but not a full explanation of when complaint processes are appropriate. Sometimes parents file complaints with the Department of Public Instruction and the U.S. Office of Civil Rights, as well as requesting a due process hearing. While this may be a deliberate strategy to find the best avenue or to get the school district's attention, it also may be an indication that parents are not always sure what is the most appropriate process for a particular issue.

The Promise of Mediation

There may be a better approach—mediation and dispute resolution. "Ninety percent of [special education] disputes could have been headed off if people were willing to talk to each other," says Margaret Meany, chief of the policy,

monitoring, and audit section in the Division of Exceptional Children of the N.C. Department of Public Instruction. What if, for example, instead of a due process hearing, Stuart's parent and the educators sat down together to generate options for addressing Stuart's difficulties with math? And what if Michael's parents and the educators were able to agree on behavior interventions and a temporary setting for Michael that would address both the parents' and the school's concerns? If these parties could agree, they would save valuable resources and begin to establish a more productive relationship for addressing the child's special needs.

Joe Walters, a professor of education at Western Carolina University who serves as a mediator as well as a state level review officer, says, "From my perspective, mediation is the first time they have been honest with each other. They quit playing games. Mediation comes closer to what was intended when the law was originally passed by Congress — two parties sitting down and working it out. Congress had in mind a much friendlier process than what our due process hearings have become." In a study conducted for the U.S. Department of Education, at least seven states that collect data on mediation programs — Arizona, California, Colorado, Illinois, Massachusetts, Minnesota, and Vermont — reported high rates of conflict resolution (at least 80 percent).[14] Information collected by the Minnesota Department of Education found that 96 percent of mediation participants in special education disputes would use mediation again and would recommend it to others.[15]

Mediation can be an answer to the time and expense of litigation. Judge Meg Scott Phipps, an administrative law judge who mediates many of the disputes for the Office of Administrative Hearings, estimates that the average length of a hearing is one to two weeks, whereas a mediation lasts one to three days.

Mediation also enables the parties to address the real issues of concern and not just the legal issues. "Sometimes I use the procedural violations as a way to get the school district's attention, but what I really want to do is improve the child's education," says Christine Heinberg, attorney with Carolina Legal Assistance — A Mental Disability Law Project in Raleigh. "Getting a piece of paper that said I won is a hollow victory if the child's education is not improved."

Table 7. Fluctuation in Times Spent Resolving N.C. Cases By Year, 1992–1997

	Days Required To Resolve						Percentage of Total*				
	To 45	46–90	91–180	181–365	Over 365	Totals	To 45	46–90	91–180	181–365	Over 365
1992	0	4	4	6	4	18	0%	22%	22%	33%	22%
1993	8	4	2	3	9	26	31%	15%	8%	12%	35%
1994	6	8	4	8	2	28	21%	29%	14%	29%	7%
1995	4	6	13	3	5	31	13%	19%	42%	10%	16%
1996	9	7	12	12	8	48	19%	15%	25%	25%	17%
1997	4	10	10	11	0	35	11%	29%	29%	31%	0%
1997 w/open cases*	4	10	15	40	5	74	5%	14%	20%	54%	7%

* Row percentages may not add to 100 due to rounding.

** Open cases are calculated as the difference between the filing date and May 1, 1998.

Source: N.C. Office of Administrative Hearings, Raleigh, N.C.

Mediation also can provide the opportunity to improve rather than further strain relationships and to reach an agreement that sets a plan for the future rather than merely identifying the wrongs of the past. "In mediation, a catharsis takes place," says Joe Walters. "The parties start out attacking each other. After a couple of hours, they are ready to look at it seriously and can come up with something neither party had proposed."

> ***"Ninety percent of [special education] disputes could have been headed off if people were willing to talk to each other."***
>
> —MARGARET MEANY,
> N.C. DIVISION OF EXCEPTIONAL CHILDREN

Special education disputes also offer some real challenges to the mediation process. Sometimes there may not be a level playing field between the parties. Mediation is less likely to be successful where one party is more powerful or knowledgeable than the other. In special education disputes, school districts generally will have more expertise on the issue and are more likely to retain a lawyer to advise them on settlement options. Deborah Greenblatt, executive director and attorney with Carolina Legal Assistance, says she always advises parents to have at least an advocate with them in a mediation. Depending on the circumstances, parents also may need to consult with an attorney to make sure the agreement is consistent with their legal rights and may need to be advised by a consultant with relevant expertise to review proposed educational plans or services.

Another challenge is the complexity of the cases. Often the disputes have many interwoven legal issues and educational decisions. Instead of merely writing a check, a settlement agreement in special education often involves writing a detailed educational plan. Sometimes the breakdown occurs not at the mediation, but in efforts to implement the agreement. Unless the communication issues have been resolved, the parties are likely to resume relationships that lack trust and collaboration.

All of these factors combined with the emotional intensity present in many of these disputes can result in parties being unable to negotiate effectively with each other. Ann Majestic, an attorney representing school districts, says that mediation does not work in the very difficult cases where the parties are locked into positions by the time mediation is attempted. This sometimes creates a "Catch-22." Many advocates feel that it takes filing a request for a hearing to get the school district's attention that they are serious. However, by this stage, the parties are more likely to be entrenched in positions and have a need to be proven right.

Mediation also is not an option where the parties want to clarify a point of law. Sometimes cases are brought to challenge a particular educational methodology or other systemic issue. Success in these cases is not viewed by the settlement of one child's rights but rather whether the school district's approach or the parent's demands will prevail for future cases.

North Carolina Mediation Programs

In North Carolina, mediation has been available after the filing of a due process claim with the Office of Administrative Hearings in the form of a mediated settlement conference.[16] Some of the administrative law judges also are certified mediators and serve as mediators in cases to which they are not assigned as a judge. Data are not kept specifically on the success of these attempts; however, only about twenty percent of cases filed reach a final decision: the rest are withdrawn, dismissed, or settled.

A much newer process is mediation prior to requesting a due process hearing. Until the law was changed in 1997, the process provided by state law gave the parent the right to request that the superintendent of the school district where the complaint arose mediate the dispute. However, the superintendent or designee was not likely to be perceived as an impartial mediator, and the process was rarely used. Although the parties would not have been precluded from selecting another mediator, there was not a clear mechanism to invoke until the law was changed in 1997. State law now provides for voluntary mediation, meaning that either the parents or the school district may request mediation, but the other party must consent. The law sets out a number of provisions to clarify the relationship between the mediation and due process hearings.[17]

The law also requires the Department of Public Instruction's Exceptional Children Division to maintain a list of qualified and trained mediators.[18] The Department plans to have the list include both mediators associated with the community dispute

Table 8. Formal Complaints to the N.C. Department of Public Instruction, 1993–94 to 1997–98

School Year	Number of Formal Complaints
1993–94	59
1994–95	52
1995–96	45
1996–97	49
1997–98	43

Source: N.C. Office of Administrative Hearings, Raleigh, N.C.

settlement centers established across the state and mediators certified and listed with the North Carolina Dispute Resolution Commission. Since the law was enacted, the Department of Public Instruction and the Institute of Government provided a training session for mediators from these community dispute settlement centers. More than 50 mediators were trained on issues specific to special education disputes. Scott Bradley, executive director of the Mediation Network of North Carolina, says the centers will use a co-mediator model where two mediators will work together with the disputing parties. In April of 1998, the Department of Public Instruction notified local school districts that these mediators are available. No information has been collected so far on whether the new mediation process has been used or on its effectiveness. Bradley predicts that it will take some time for parties to avail themselves of the process and that this is the beginning of a long-term effort to encourage mediation.

While mediators have been trained, there is little information to assist potential participants — parents and educators — in understanding this option. The Department of Public Instruction produces a parent handbook that is distributed by schools to parents as a means of providing the legally required notice of the parents' and child's rights. Although the current handbook identifies the options of resolving concerns through formal complaints, due process, and mediation, the book does not attempt to help parents understand how to choose the most appropriate option or how to participate effectively in the process. Some state departments of education, including the Michigan Special Education Mediation Program, aggressively advocate the use of informal resolution. Illinois also strongly encourages mediation and has trained mediators on staff. Beth Jones, an educator who works with children with behavior disabilities in Illinois, says that the state often tells school districts to mediate and that the state's mediation programs are one of the best things Illinois has done to help resolve special education disputes.

The Money Issue

Although the requirements for special education are found in the federal legislation, the federal government only funds a fraction of the additional costs associated with serving special needs children. School districts get most of their funds from the state. In 1997–98, for example, the federal government provided North Carolina $488 per child aged 5 to 21 in special education. The state provided an additional $2,248.39 for each of these K–12 students, or 82.2 percent of total state and federal funding. This is in addition to appropriations for regular classroom students. But state funds also may not be sufficient, and many school districts seek additional funding from county boards of commissioners. When these combined funding sources still are not sufficient, educators may try to find ways to use resources from the regular educational program to meet the federally mandated programs for children with special needs. The amount of funding added at the local level varies in part because of the amount of property wealth available to be taxed in the county and the willingness of the county commissioners to fund these programs (tax effort).

Deborah Greenblatt, executive director and attorney for Carolina Legal Assistance, says the dollar issue is important because many special education disputes stem from a scarcity of resources. "Money becomes an issue in whether the child gets the needed services," she says.

Other Elements of a Dispute Process

In North Carolina, special education disputes can be addressed through a formal process with the Department of Public Instruction, through media-

tion before or after filing a due process hearing, and through a hearing with a right of appeal. All of these processes are established by law. However, in addition to asking how well these programs are working, an equally important question is what other programs should be in place in order to resolve disputes expeditiously and with as little wear and tear as possible on the relationship between the parents and the school. There are no other processes or programs established by law; however, there could be a more fully developed continuum of dispute processes that would provide parents and school systems various approaches to settling their differences amicably before resorting to due process hearings.

In California, such a continuum is referred to as a "multi-door approach." The multi-door approach, or continuum, includes processes to prevent conflicts as well as informal and formal dispute processes. The continuum is premised on the concept that parents should be well informed, and communication should be open between the parents and educators. Processes which provide a means for parents to be better informed can help parents participate in generating realistic options for addressing the child's needs, which can lead to a quicker and better resolution of the dispute. Communication is an ongoing issue for resolving disputes quickly and maintaining an effective relationship between educators and parents for providing the educational program to the child.

As one example, a program that has worked effectively in the San Diego Schools is the deployment of **parent facilitators**. Besieged by parent complaints and due process hearing requests, the school district implemented a parent facilitator program in 1979. The program hires parents of special needs children and provides extensive training to them. Facilitators help parents find resources, link parents with other parents with similar issues and concerns, provide information about rights and the educational process, and accompany parents to meetings to discuss the child's education plan. The facilitators do not represent the parents in mediation, although they are expected to inform the parents of their right to use mediation. Kay Bowdinger, team leader of the special education parent facilitation program, says the program has continued since 1979 at least in part because it has proven to be cost effective for the school district by reducing the number of due process hearing requests. Georgianne Knight, a special education consultant with the California Department of Education, says that while schools that have implemented such programs may initially have been worried about using parent advocates within the system, they have found that "good things happen when parents feel welcome." There is no comparable program in North Carolina.

Another option on the preventive end of the continuum is **conflict resolution** training. In Michigan, the Community Dispute Resolution Program and the Michigan Special Education Mediation Program regularly provide training on conflict resolution. As a participant in a training session offered by the Dispute Resolution Center of Central Michigan states in an evaluation, "I think all staff could use mediation methods for conflicts

Table 9. Time Spent in Resolving Formal Complaints to the N.C. Department of Public Instruction, 1996–97 to 1997–98

School Year	60 days or less*	Within 70 days	Extension Given	Complaint Removed**	Total
1996–97	30	5	9	5	49
1997–98***	14	6	5	2	27

* Law requires a decision within 60 days.

** Includes circumstances where a due process request was also filed, the complaint was withdrawn, or the complaint was suspended pending investigation by the U.S. Office of Civil Rights.

*** Includes only complaints which required a response by May 27, 1998.

Source: N.C. Office of Administrative Hearings, Raleigh, N.C.

within the building." In North Carolina, all special education directors in the state have received mediation training. In addition, some school districts provide training for staff, such as the Lee County Schools. Linda Marsal, former Lee County Schools exceptional children's director, says that principals and assistant principals received conflict resolution training, although it was an ongoing effort to provide training for new staff and to provide follow-up training. There are organizations in the state that can provide such training to parents and educators, including some of the dispute settlement centers located across the state. However, currently there is no organization providing training to parents and staff on a systematic basis in North Carolina.

Other approaches along the continuum include the use of **neutral facilitators**. A neutral facilitator can help the participants overcome poor communications patterns so that they may reach a resolution. One proponent of using neutral facilitators is Butch Elkins, executive director of the Governor's Advocacy Council for Persons with Disabilities. "Time and time again, I've seen situations where the parents and educators have another five years together and they've gotten off to a bad start and can't be in the room together," says Elkins. He tells parents that his strongest suggestion is to agree to a mediator and work with the person through the IEP meetings and other times the educators and parents must work together. When they do it, says Elkins, parents rarely get in touch with his office with further complaints. Currently, there is no organized program in North Carolina for the use of facilitators. Rather such use has depended on the initiative of the people involved in the dispute.

Another option along the continuum is **impartial review**. The review is conducted by knowledgeable professionals who spend one or two days on site and provide a non-binding second opinion on the issues in controversy. Such a program has proven successful in Michigan.

Binding or non-binding arbitration is another means of resolving the issue short of a due process hearing. Arbitration can operate like a miniature trial with limited records and testimony. Unlike mediators, arbitrators render a decision. The decision can bind the parties, or it may be an advisory opinion that helps the parties decide whether to pursue a due process hearing, or it may help craft the terms of an agreement. Arbitration may be appropriate where the parties cannot identify settlement options and one party's point of view must prevail over the other. For example, there is no middle ground in a dispute over whether a school district should place a child in a private, residential setting. Tom West, a former administrative law judge and now a private attorney, has conducted due process hearings and at least one arbitration. He says that the time spent in arbitration may be closer to the intent of the IDEA in providing an expeditious decision. Although nothing now prevents school districts and parents from electing to use arbitration, no processes or guidelines are in place to assist parties in using this form of dispute resolution or to train hearing officers (whether private attorneys, professionals, or state officials) in conducting arbitrations.

A Dispute Resolution Continuum

North Carolina currently does not have a continuum or multi-door approach as state policy. While individual school districts may provide conflict resolution training or may seek arbitration, there is no statewide effort to offer a variety of approaches to preventing or resolving disputes. In California, grants are given to regional education agencies for creating their own continuum so that programs may be developed to suit local needs. There is little research beyond anecdotal evidence to suggest what approaches are the most cost-effective or likely to achieve the greatest results. Yet the extraordinary costs of due process hearings for parents and school districts create an incentive to look beyond the processes that are required by law.

So what if North Carolina had a continuum of dispute resolution processes? Again, a look at the hypothetical cases of Stuart and Michael is instructive. Both boys' parents would be able to address their concerns as early as possible — before they reached the point of having irreconcilable differences with the school system. Stuart's parent might have a better understanding of the options facing him after the parent facilitator helped him get in touch with parents of children with similar learning disabilities. The parent facilitator also could accompany Stuart's parent to meetings to help him learn how to express his concerns and be a more effective part of the team. Michael's parents might utilize an impartial review team to gain more information about how Michael's disruptive and assaultive behavior could be addressed. After a non-binding arbitration, the parents might be willing to remove Michael from

Karen Tam

the regular classroom environment while the school implemented the desired behavior interventions. The end result could be that both educators and Stuart's and Michael's parents are satisfied that these children are receiving a free and appropriate public education — without the time, expense, and vitriol of a due process hearing.

Conclusion

The general consensus among participants is that due process procedures in North Carolina have become too cumbersome, lengthy, and complex to serve the purpose of providing an accessible means for parents to resolve disputes. Cases may take well over a year to resolve rather than the 45 days intended by federal law. The answer for resolving this problem may lie in reworking the process to expedite these cases. However, most participants also agree that it is at least as important to provide effective alternatives to the due process hearing for resolving disputes.

The formal complaint process is one alternative. It has proven effective for its limited purposes, such as addressing whether the school district is providing agreed-upon services. But when the issue is more complex — there is, in fact, no agreement about service — then the participants must look to other alternatives. While mediation before the filing of a complaint is too new to evaluate fully, it holds the promise of providing a less expensive alternative that can resolve complex disputes and perhaps even improve the relationship between the parents and educators. What is missing in North Carolina is a state policy encouraging or requiring a broad array of other options to try to resolve the disputes along a continuum from conflict resolution to arbitration. The preventive measures aimed at better communication could prove to be the most important missing link, since they may enable parties to work through issues before becoming entrenched in positions and determined to settle their differences in court.

FOOTNOTES

[1] Chapter 584 of the 1965 North Carolina Session Laws.

[2] Chapter 1293 of the 1973 Session Laws (2d Session 1974), now codified as N.C.G.S. 115C-106(a).

[3] 20 U.S. Code 1415(b)(6).

[4] 20 U.S. Code 1415(h).

[5] 34 Code of Federal Regulations 300.512.

[6] N.C.G.S. 1A-1, 26 N.C. Administrative Code 3.0112(b).

[7] N.C.G.S. 150B-33(b)(4).

[8] Data fields were provided by the Office of Administrative Hearings to the NC Center for Public Policy Research in the form of a spreadsheet. The data are current as of May 1, 1998. All calculations were performed by the author.

[9] Eileen M Ahearn, *Due Process Hearings: An Update*, Report to the Office of Special Education Programs, U.S. Department of Education, Project FORUM, National Association of State Directors of Special Education, Alexandria, Virginia, 1997, p. 5.

[10] 20 U.S. Code 1412(a)(5)(A).

[11] 34 Code of Federal Regulations 300.660-62.

[12] Unpublished data maintained by the Exceptional Children Division of the N.C. Department of Public Instruction.

[13] Unpublished data maintained by the Exceptional Children Division of the N.C. Department of Public Instruction, calculations made by the author.

[14] Judy Schrag, Ed.D., *Mediation and Other Alternative Dispute Resolution Procedures in Special Education*, Report to the Office of Special Education Programs, U.S. Department of Education, Project FORUM, National Association of State Directors of Special Education, Alexandria, Virginia, 1996, p. 19.

[15] *Mediation and Other Alternative Dispute Resolution Procedures in Special Education*, p. 27.

[16] N.C.G.S. 150B-23.1.

[17] N.C.G.S. 115C-116.

[18] N.C.G.S. 115C-116.

What differentiates the oppression and discrimination of the disabled from other traditionally marginalized groups is that in one quick instant — a slip in the bathtub, a virus-borne disease — anyone can join us, the disabled (currently estimated at 49 million in the United States). In fact, at some point in our lives, each and every one of us, sooner or later, will be, whether for short term or long, in some way disabled.

—KENNY FRIES

STARING BACK — THE DISABILITY EXPERIENCE FROM THE INSIDE OUT