

# The Case for Voluntary Binding Arbitration

It's not what you think



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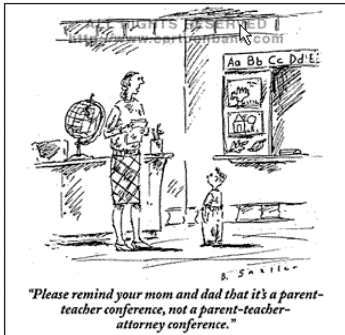
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■ But the law is more often than not in the business of avoiding substantive issues by recasting them as issues of procedure. Rather than directly confronting the moral questions apparently animating a case, courts will replace them with the questions demanded by the tests, models and magic phrases that make up the machinery of legal inquiry in a particular area. The process of applying those tests and models and of invoking those phrases has the effect of distancing one from the urgencies felt by the opposing parties as the professional urgency to find the right (or most persuasive) rubric becomes paramount. Stanley Fish, "Is Religion Special?", *The New York Times Opinionator*, July 26, 2010

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## Existing Dispute Resolution Mechanisms in IDEA

- Parent-teacher conferences
- IEP meetings
- Mediation
- Due process hearings
- Civil proceedings

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## Efforts to Improve Dispute Resolution Processes

- Facilitated IEPs
- “Mandatory” Mediation
- Resolution Session

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## Efforts to Improve Hearing Process

- Training of Hearing Officers
  - possess a fundamental understanding of this Act, Federal and State regulations pertaining to this Act, and interpretations of this Act by State and Federal courts;
  - possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
  - possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

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### Focus of Existing Mechanisms

- Mediation: agreement by *Parties*
  - Parent-teacher conferences
  - IEP meetings (facilitated & otherwise)
  - Mediation (facilitated & otherwise)
- Hearings: decide *Dispute*
  - Due process hearings
  - Civil proceedings

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### Strengths of Existing Mechanisms

- Mediation
  - Record of success
  - Less adversarial
- Hearings
  - Finality
  - Remedy

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### Weaknesses of Existing Mechanisms

■ Mediation	■ Due Process
□ Tenuous	□ Cost
□ Difficult to maintain	□ Procedural
□ Uncertain results	□ Inequitable
	□ Adversarial

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### Common Weaknesses

- Necessary information often limited
- Too long to get result
- Decisions often by persons w/o expertise
- Focus is not on child's needs

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### PCESE: Planting of Seed

- **Testimony:** "There should and must be a wide variety of dispute resolution procedures available for both parents and school districts to use. . . . One additional dispute resolution procedure might be voluntary but binding arbitration available only upon the election of both of the parties. I suspect many parents and schools would be willing to waive their rights of appeal from such decisions if they were fair, impartial and fast."
- **Report:** "The Commission agrees and recommends IDEA permit the creation of voluntary binding arbitration systems. There is simply no reason that parents and schools should not have the option of waiving — with full knowledge of the consequences — their right to further procedural protections and appeals in the IDEA due process system in exchange for a speedier and more assured resolution."

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### Objectives: Why Arbitration?

- Focus on student needs
- Reduce reliance on attorneys
- Focus proceeding on fact-finding
- Make forum less adversarial
- Shorten timeline for decision
- Decrease costs of process
- Increase expertise of decision maker

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### Arbitration: The Issues

- Either
  - ❖ Specific issue(s) submitted by the parties
- Or
  - ❖ What programs and services the student requires to receive an appropriate education
- In either case, decision limited to expiration of current school year

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### Arbitration: The Issues

- What programs and services the student requires to receive an appropriate education
  - ❖ Focus on substance, not procedures
  - ❖ What the IEP should contain
- *Possible exception*: compensatory services (history of failure)

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### Arbitration Will Discourage Use of Attorneys

- Unequal access to attorneys
- Attorneys focus on procedures
- Attorneys raise adversarial level
- *Conclusion*
  - ❖ Parent veto on attorney (unless represented)
  - ❖ Decision maker limits role of all attorneys
  - ❖ Parent has right to advocate

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## Arbitration Must Be Binding

- Decision not subject to appeal
  - ❖ Reasons: appeals are costly, time-consuming and require attorneys
- Exceptions
  - ❖ All issues identified not included in remedial order
  - ❖ Party not complied with remedial order

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## Arbitration Must Be Voluntary

- Voluntary by both sides
- Voluntary means fully “informed”
- Procedures similar to those for resolution agreement (see below)

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## Arbitration Must Be Informed

- Both parties must fully and completely understand what arbitration means
  - ❖ What they are gaining
  - ❖ What they are losing
- Must assure informed consent by parents
  - ❖ Explanation of ++/-- by impartial person
  - ❖ Use vouchers to secure informed consent

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### Elements of Informed Consent

- Explanation by impartial person
- Consent is in writing
- Both parties have 24 hour “walk-away”
- Rights waived are limited to one year and spelled out with specificity
- Any statutory requirements are followed

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### Arbitration Must Be Fast

- Less time than due process
  - ❖ > 45 day timeline
- Mandated timeline?
  - ❖ Complete flexibility in decision maker

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### Arbitration Should Be Informal

- Procedures established by decision maker
  - ❖ Arbitrators have total discretion concerning attorneys’ actions, e.g., motions, etc.
- No formal rules of evidence
  - ❖ Arbitrators may allow admission of whatever they might find useful
- No right of cross-examination
  - ❖ Submit questions to arbitrator(s)

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### Arbitration Should Have No Record

- Temporary video/audio record
  - ❖ Enable arbitrator(s) to prepare decision
- No formal permanent transcript or record
  - ❖ Reason: reduce challenges to proceeding
  - ❖ Historical record shows that “non-appealable” arbitrations challenged on various procedures

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### Arbitration Must Decide Dispute

- Must result in a specific decision
- Decision must include remedial order
  - ❖ Specific remedial measures to be taken
  - ❖ Form basis for noncompliance appeal
- Decision good for balance of school year

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### Arbitration Order Must Be Enforceable

- Appeal to SEA?
- “Examination” by SEA?
  - ❖ *Example:* current “complaint” review
- State or federal court?

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## Arbitration Requires Active Decision Makers

- **Problem:** without attorneys, who develops record?
- **Solution:** decision maker assumes active role (inquisitor)
  - ❖ Frame (re-frame) issues
  - ❖ Question witnesses
  - ❖ Request evidence

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## Who Should Be Arbitrators?

- Key to success of process
- Alternatives
  - ❖ 3 Member Tribunal
  - ❖ Single Arbitrator
- Who chooses?
  - ❖ 3 Member Tribunal – SEA?
  - ❖ Single Arbitrator – parties?

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## Arbitrators Must Be Qualified

- Qualifications are crucial to trust
- Professional Qualifications
  - ❖ Primary focus: education
  - ❖ Secondary focus: law
- Other Qualifications
  - ❖ Manage proceeding
  - ❖ Write logical, concise, enforceable order

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### Other Arbitration Efforts

- Minnesota briefly tried a tentative program for special education arbitration
  - Decision must be binding, arbitrator from state list, and the decision issued within 20 days of the agreement to arbitrate.
  - Arbitration rejected by both sides

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### Other Arbitration Efforts

- Iowa was said to have tried "hybrid" arbitration system; no data found
- Lyn Beekman: appointment of a neutral third-party as a "Mutually Agreed Upon Authority."

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### Basic Procedures (Sample)

- Offer of arbitration
- Initiation of process (consent)
- Appointment of arbitrator(s)
- Establishment of arbitration timelines
- Marshalling of evidence
- Presentation/examination of evidence
- Written decision

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## Common Concerns

- General reactions
  - ❖ Why additional process – improve existing process?
  - ❖ How binding is binding – can appeal rights be waived?
- Specific concerns
  - ❖ Need for legal representation
  - ❖ Can consent be “informed”?
  - ❖ Will results be better?

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## Concluding Observations

- No panacea; simply additional mechanism
- I'd like to hear your comments
- Please email me:  
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