Inclusive Education and Alternative Dispute Resolution: Rights and Interests

Carole J. Petersen
Spark M. Matsunaga Institute for Peace & Conflict Resolution & William S. Richardson School of Law
University of Hawaii at Manoa
**CRPD Art 24: States Parties commit to**

- Provide an inclusive and quality education
- With reasonable accommodations for individual requirements
- Individualized support measures . . . to maximize academic and social development, consistent with goal of full inclusion
CPRD Art 4: States Parties commit to

- 1 (a) adopt all appropriate legislative, administrative and other measures [to implement the rights recognized in CRPD]

- 2. With regard to economic, social and cultural rights . . . take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights . . .
CRPD Art 13: States Parties commit to

- Ensure effective access to justice for persons with disabilities on an equal basis with others
- Provide procedural and age-appropriate accommodations
- To facilitate their effective role as direct and indirect participants . . . in all legal proceedings
Together these articles provide:

- A substantive right to an inclusive and quality education (Art 24)
- Implemented by legislative and administrative measures (Art 4)
- Procedural rights: accessible and inclusive enforcement mechanisms that provide access to justice (Art 13)
Status of the CRPD in the USA

- President Obama signed in Aug. 2009
- If Senate ratifies, USA will likely file declaration that existing laws already fulfill obligations under Art 24. Relevant laws:
  - Rehabilitation Act
  - Americans with Disabilities Act (ADA)
  - Individuals with Disabilities Education Act (IDEA)
Rehabilitation Act 1973, s. 504

- No qualified individual should be excluded, denied the benefits of, or discriminated against based on disability in any program or activity receiving federal funding.
- Plaintiff must be an “otherwise qualified individual with a disability.”
- Implementing regulations adopt a definition of disability that is similar to that in the ADA.
Americans with Disabilities Act

- Enacted in 1990, the ADA prohibits disability discrimination in education and other fields.
- Requires reasonable accommodations for students with disabilities (e.g. examinations, assistance with note taking).
- In order to rely upon the ADA, the Plaintiff must prove she has a recognized impairment that substantially limits a major life activity (this may include the activity of learning).
ADA Mediation Guidelines

- ADA is enforceable in court but mediation is commonly used to resolve disputes.
- Guidelines are voluntary; signal that mediator is familiar with disability issues and committed to making mediation accessible and inclusive.
- But do not expressly address issues raised by “mediation of special education disputes”.

Individuals with Disabilities Education Act (IDEA)

- Prior to 1975, public schools routinely excluded children with disabilities.
- Education for all Handicapped Children Act, enacted in 1975.
- 2004: Individuals with Disabilities Education Improvement Act (IDEA 2004)
**Substantive Standards in IDEA**

- **Goal:** to enable children with disabilities to obtain meaningful education and become self-sufficient members of society
- **State and local agencies receiving federal funding must provide a:**
  - Free
  - Appropriate
  - Public Education (FAPE)
  - In the Least Restrictive Environment
Comparing IDEA with other laws

- IDEA is wider than ADA: no need to prove a disability that limits a major life activity.
- IDEA can thus benefit students with relatively minor learning disabilities as well as students with more severe impairments.
- Focus is not on proving discrimination but rather on requiring school districts to provide an appropriate education.
School District Responsibilities

- Identify and evaluate children with disabilities.
- Design an Individualized Education Program (IEP) for each child with a disability.
- Include the parents on the IEP team.
- Enable student to obtain a meaningful education in the least restrictive environment.
- Students should not be placed in caretaking programs with little educational benefit.
An IEP should set forth:

- Present level of academic performance.
- Measurable annual goals.
- Services and technology to be provided.
- Extent (if any) that the child will not participate with peers in the regular classroom.
- Individual accommodations in assessments.
- Duration, frequency, and location of services.
- Transitional services to assist in attaining postsecondary training or employment.
Procedural Safeguards include:

- Parents have right to participate in evaluation, obtain school records, and attend meetings regarding the IEP.
- IEP team meets at least yearly to revise IEP.
- Re-evaluation every three years.
- Parents also have the right to obtain an independent evaluation.
- Procedures crucial because substantive provisions of IDEA are so general.
Implementation of IDEA

- Initial process is normally a negotiation.
- School District offers a “placement” and a proposed package of services.
- Parents respond and may request a different placement or educational package.
- Much depends upon the ability of parents to negotiate and advocate for their child. This may lead to inequality from family to family.
IDEA Formal Dispute Resolution

- If a dispute arises parents have a right to file a formal complaint.
- May request a Due Process Hearing: a quasi-judicial forum where both sides present witnesses, evidence, legal arguments.
- Hearing officer’s decision may be appealed to the state educational authority or directly to court (depending on the relevant state law)
Typical remedies if successful

- Order that a school district provide a particular service or placement.
- Order that the school district reimburse parents for the cost of private education while disputing placement offered by the school.
- Order of compensatory education.
- Order that school district pay parents’ attorneys fees (not general rule in the USA).
Critique of the Hearing Model

- Parents and lawyers must advocate for child if the school district fails to provide FAPE.
- Schools may view parents as adversaries rather than partners.
- Hearings are expensive and slow.
- Resources and time are diverted away from education and into litigation.
- Yet the possibility of a due process hearing is an important procedural safeguard.
Encouraging ADR in IDEA

- 1997: IDEA amended to require states to provide (and pay for) mediation of complaints.
- Goals: reduce number of hearings & preserve relationship between parents and school.
- Mediation: voluntary and could be waived.
- If no agreement reached then complaint could still proceed to a hearing (statements in mediation could not be used in the hearing).
Critique of Mediation in IDEA

- Schools bring budget constraints to the table.
- Leads to a compromise rather than an “appropriate” public education for the child.
- May exacerbate power imbalances.
- May undermine statutory goals (introduces interests outside the goals of IDEA).
- Parents continue to file large numbers of requests for hearings, perhaps reflecting a distrust of the mediation process.
2004 IDEA aims to increase ADR

- Encourages mediation of almost any dispute; no need to wait for a complaint to be filed.
- Written agreements can be incorporated into the IEP and are binding and enforceable.
- Mandates that mediators be knowledgeable about "special education law".
- No requirement of consistent approach: mediators may use facilitative, evaluative, or transformative approaches to mediation.
2004 IDEA: Resolution Sessions

- Local education agency must convene a meeting with parents within 15 days of receiving complaint.
- 30-day window before hearing.
- School cannot bring an attorney unless the parents do so.
- School must send someone with decision-making power; if not voided in 3 days the agreement is binding and enforceable.
Critique of Resolution Session

- Parents have less experience than school district and may be at a disadvantage.
- Unlike mediation, there is no third-party neutral at the meeting to control the process and ensure parents understand the offer.
- Schools are not required to pay attorney fees arising from Resolution Session; may discourage parents from bringing an attorney.
- May just delay the right to a hearing.
Facilitated IEP Meetings

- Not required but available in some states.
- Goal: to create a collaborative and well-written IEP and prevent disputes.
- Impartial facilitator helps team stay focused on the IEP; encourages collaborative rather than competitive negotiation techniques; prevents breakdowns in communication.
- The facilitator is not a member of the IEP team but should understand the law.
CPRD in Mainland China

- China participated in drafting the CRPD and was in the first group of countries to sign it.

- Filed its notice of ratification in Aug. 2008

- No reservations for Mainland China; one reservation for Hong Kong (on immigration)

Art 25 requires “ordinary educational institutions” to admit students with disabilities if they meet admission requirements and are able to receive “ordinary education.”

If denied admission, family can appeal to higher authorities, who will “instruct the school to admit the student”.
Implementation in China?

- Lacks mechanisms that are comparable to the IEP and the due process hearing.
- Mediation tends to be more directive in China.
- Recent reports claim significant increase in education for children with disabilities.
- But “special schools” feature prominently in reports and there are continued reports of children being excluded (e.g. Hep B carriers).
Problems to address in China

- Disability rights activists complain of harassment by security officials.
- Activists lack freedom of expression, assembly, and association.
- Independent NGOs must have the right to submit alternative reports to the Committee on the Rights of Persons with Disabilities (the Federation of Disabled Persons is a government-sponsored organization).
Hong Kong and the CRPD

- Hong Kong is much closer to complying with the CRPD than Mainland China.
- Hong Kong’s Disability Discrimination Ordinance takes a more “rights based approach” than Mainland China’s law.
- Hong Kong also has far better protection of civil liberties and an active NGO community.
Critique of Hong Kong Enforcement Model

- Complainants can litigate directly but most rely on EOC for investigation & conciliation.
- EOC attempts conciliation before considering an application for legal assistance.
- Interviews: complainants feel weaker in conciliation conference, in part because they do not know whether they will receive legal assistance if conciliation fails.
Impact of Enforcement Model?

- Complainants also reported a desire for more advice in conciliation conferences.
- Difficult to provide in the current model (primarily facilitative rather than evaluative mediation).
Conclusions: Experience in the USA provides some lessons on implementation

- Procedural rights are crucial but may be ineffective in the absence of strong negotiation and advocacy skills.
- US model probably relies too heavily upon parental advocacy, perpetuating inequality.
- While attorney fees help, an independent advocate for children with disabilities might address this problem at earlier stages.
Questions?