



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

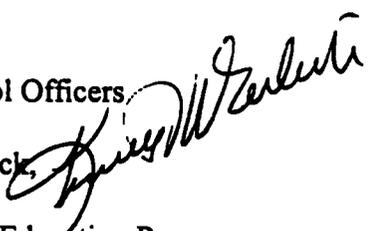
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MEMORANDUM

To: Chief State School Officers

From: Kenneth R. Warlick, 
Director
Office of Special Education Programs

Subject: Questions and Answers on Mediation

In response to requests from the field for a document that restates and consolidates guidance that the Department has provided regarding mediation under Part B of the Individuals with Disabilities Education Act, the attached question and answer document is being issued. The question and answer document restates the requirements reflected in the final regulations implementing the Individuals with Disabilities Education Act Amendments of 1997 (IDEA), Pub. L. 105-17, published on March 12, 1999, at 34 CFR Part 300, and the explanations provided in Attachment 1, Analysis of Comments and Changes, in response to public comments on the proposed regulations applicable to mediation.

The attached questions and answers have been prepared to assist State and local education officials, as well as parents of children with disabilities in understanding the requirements of Part B of the IDEA as applied to mediation. This question and answer document represents informal policy guidance; however, the statute and regulations upon which it is based are binding on public agencies receiving funds under Part B.

We hope that the attached question and answer document is helpful. Please ensure that this document is widely disseminated throughout your State so that this information can be provided to a large variety of individuals and organizations. If you or members of your staff have questions, please contact the persons whose names and telephone number are listed at the top of this memorandum.

Attachment

- c: State Directors of Special Education**
- Preschool Coordinators**
- Federal Resource Centers**
- Regional Resource Centers**
- Office of Non-Public Education**
- Protection and Advocacy Organizations**
- Parent Training and Information Centers**
- RSA Regional Commissioners**
- Independent Living Centers**

Questions and Answers on Mediation

Question 1: What is Mediation?

Answer: Mediation is an impartial system that brings the proper parties who have a dispute to confidentially discuss the disputed issues with a neutral third party with the goal of resolving the disputes in a binding written agreement. Under the Individuals with Disabilities Education Act (IDEA), mediation is voluntary on the part of parties. A party can include the parents of a child with a disability or representatives of the local education agency (LEA), or, as appropriate, the State education agency (SEA), or other public agencies that have responsibility for the free appropriate public education (FAPE) of children with disabilities. *See*, 34 CFR § 300.506.

The mediation process offers an opportunity for parents and public agencies to resolve disputes or complaints about any matter involved in proposals or refusals to initiate or change the identification, evaluation, or educational placement of the child or the provisions of FAPE to the child with a disability. 34 CFR § 300.503(a)(1) and 34 CFR § 300.506.

Question 2: When is mediation available?

Answer: IDEA provides for the option of mediation whenever a due process hearing is requested and each party may end the mediation process at any stage and proceed with a due process hearing for any reason consistent with the IDEA. However, public agencies are strongly encouraged by the Office of Special Education Programs to offer mediation or other alternative systems of dispute resolution prior to the filing of a request for a due process hearing, and whenever other disputes regarding a child's educational program arise.

Question 3: How is mediation different from due process hearings?

Answer: Mediation and due process hearings under the IDEA are similar in that both may be initiated for similar disputes and the goal of both is to achieve resolution of the disputed issues.

Both processes are initiated by either a parent or a public agency and in each process both are conducted by an impartial individual. Both mediation and due process hearing procedures may be about any matter in proposals to initiate or change the identification, evaluation, or educational placement of a child with a disability or the provisions of FAPE to the child. Also, both mediation and due process hearings may be about refusals to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child with a disability. *See*, 34 CFR §§ 300.506, and 300.507.

While mediation and due process hearings have similarities, they are different in many important ways. Under mediation, parties establish the ground rules and identify their potential remedies and the process is voluntary at every phase. In a due process hearing, once one party has initiated the process, all necessary parties must participate and the ground rules for presenting disputes as well as remedies available are those established for all hearings under applicable Federal and State law. The mediator acts as facilitator and does not pass judgment on specific issues. By contrast, in a due process hearing, the adjudicator, while impartial, is required to make conclusions of fact and law and to render a legal judgment that includes the specific remedies. The decision of the hearing officer in a due process hearing is binding, unless appealed. While a written agreement reached in mediation is also binding, it is generally more difficult to appeal under most States' contracts law.

Additionally, the negotiation discussions and settlement positions of parties in a mediation session are generally confidential (see answer to question 17 below for exceptions). By contrast, due process hearings may, under certain conditions, be open to the public. In addition, the public agency, after deleting any personally identifiable information, shall make due process hearing findings and decisions available to the public. Finally, a due process hearing is more formal. It is the first required administrative process available under the IDEA to resolve disputes when parents and school districts cannot resolve a complaint or dispute about the delivery of FAPE to children with disabilities.

Question 4: What is a mediator?

Answer: A mediator is an impartial individual who conducts the mediation process. The parties present their positions to the mediator who attempts to resolve disputes by facilitating discussion between the parties to reach an agreement acceptable to all participants.

An individual who serves as a mediator may not be an employee of any LEA or any State agency receiving a subgrant for any fiscal year, or an employee of an SEA that is providing direct services to a child who is the subject of the mediation process. The mediator must not have a personal or professional conflict of interest.
34 CFR §§ 300.506(c)(1) – (c)(ii).

Question 5: What if a mediator is paid by a LEA or State agency, is this a conflict of interest?

Answer: A person who otherwise qualifies as a mediator is not an employee of a LEA or State agency solely because he or she is paid by the agency to serve as a mediator.
34 CFR § 300.506(c)(2).

Question 6: Where do I find a mediator? How is a mediator selected?

Answer: The success of mediation is closely related to the mediator's ability to obtain the trust of both parties and commitment to the process. One important way to establish this trust will be the selection of an impartial mediator. To build trust and commitment in the process of selecting a mediator, the IDEA provides two options in selecting a mediator. First, the State maintains a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. A mediator may be selected from this list on a random (e.g., a rotation) basis. Second, if a mediator is not selected on a random basis from the State-maintained list, both parties must be involved in selecting the mediator and agree with the selection of the individual who will mediate. 34 CFR §§ 300.506(b)(2)(i), 300.506(b)(2)(ii).

The mediator must be trained in effective mediation techniques. Under the IDEA, a qualified mediator is one who is knowledgeable in laws and regulations relating to the provision of special education and related services. The regulatory requirement for the use of a qualified mediator instructed in effective mediation techniques helps ensure that decisions about the effectiveness of specific techniques, such as the need for face-to-face negotiations, telephone communications, and implementation of provisions of an individualized education program (IEP), are based upon the mediator's independent judgment and expertise. 34 CFR § 300.506(b)(1)(iii) and 2(i).

Because of the need to allow flexibility in the independent judgment and expertise of each mediator and the unique issues of each dispute, the IDEA does not regulate the specific techniques that may be required of mediators.

Question 7: May more than one mediator be selected to conduct a mediation process under § 300.506 of Part B of the IDEA?

Answer: No, for the mediation process required under IDEA, section 300.506 of Part B of the IDEA states that each mediation is to be conducted by one mediator. The use of a single mediator is important to ensure clear communication and accountability. The State is required to have such a system in place, however, it is voluntary on the part of the parent and the public agency. If, however, a State or local school district offers mediation in addition to that required by the IDEA, nothing in the IDEA would preclude the mediation not required under the IDEA from being conducted by multiple mediators. See, 34 CFR § 300.506 and Analysis of Comments and Changes, published as Attachment 1 to the final regulations, 64 Fed. Reg. at 12611-612 (Mar. 12, 1999).

Question 8: May current LEA employees serve as mediators?

Answer: No. While there is nothing in Part B of the IDEA regulations that precludes parents and LEA employees from attempting to resolve disputes through an informal process, the use of current LEA employees as mediators is not permissible for the mediation required under the IDEA. 34 CFR § 300.506. In addition, individuals who serve as a mediator may not be employees of any LEA or any State agency that receives a subgrant for any fiscal year under Part B of the IDEA. An individual who serves as a mediator may not be an employee of an SEA that is providing direct services to a child who is the subject of the mediation process, and must not have a personal or professional conflict of interest. 34 CFR §§ 300.194, and 300.506(c)(1)(i)(A).

By contrast, due process hearing officers may be employees of a State agency or LEA that is not involved in the education or care of the child. 34 CFR § 300.508. This difference between the requirements for due process hearing officers and mediators as well as the requirement that mediators have specialized expertise in laws and regulations relating to the provision of special education and related services were included to try and make mediation a more attractive option for parents and an effective option for both parties.

Question 9: What are the benefits of mediation?

Answer: While mediation cannot guarantee specific results, mediation can be an efficient and effective method of dispute resolution between the parents and the LEA, or, as appropriate, the SEA or other public agency. Mediation often results in lowered financial and emotional costs compared to due process. Given its voluntary nature and the ability of parties to devise their own remedies, mediation often results in written agreements where parties have an increased commitment to, and ownership of, the agreement. Some parties report mediation as enabling them to have more control over the process and decision-making, thus serving as an important tool of self-empowerment. Additionally, remedies are often individually tailored and contain workable solutions, easier for the parties to implement as both parties have been involved in the specific details of the implementation plan.

Mediation may also be helpful in resolving State complaints under §§300.660-300.662. If mediation is used in the resolution of a State complaint, it should not be viewed as creating, in and of itself, an exceptional circumstance justifying an extension of the 60 day time line. See, 34 CFR § 300.506 and Analysis of Comments and Changes, published as Attachment 1 to the final regulations, 64 Fed. Reg. at 12612 (Mar. 12, 1999).

Question 10: How long does the mediation process take?

Answer: The length of the mediation process depends on a number of factors, including the type and complexity of issues presented, the availability of the parties, and willingness of the parties to cooperate. Also, the length of the mediation process will depend on the individual techniques used by the mediator. However, the length of the mediation process cannot be used to extend the 45-day deadline to issue a due process hearing decision unless both parties agree. 34 CFR § 300.506 and Analysis of Comments and Changes, published as Attachment 1 to the final regulations, 64 Fed. Reg. at 12612 (Mar. 12, 1999).

Question 11: Where are mediation meetings held?

Answer: Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient and accessible to the parties to the dispute. 34 CFR § 300.506(b)(4).

Question 12: Who bears the cost of paying for the mediation process?

Answer: The State bears the cost of paying for the mediation process required under the IDEA, including the costs of other meetings such as meetings to discuss the benefits of the mediation process and the fee charged by the mediator. The requirement that States bear the cost of paying for the mediation process required under the IDEA should not be confused with offers by the State for mediation at times not covered by the IDEA. States have the option to offer mediation at other times not required by the IDEA at their discretion. The requirement under the IDEA that the State bears the cost for mediation applies only to the mediation required under the IDEA. 34 CFR §§ 300.506(b)(3), 300.506(d).

Question 13: Who may participate and attend the mediation meeting? May parents or public agencies bring their attorneys to mediation meetings and, if so, under what circumstances?

Answer: Inherent in the decision to proceed with a mediation meeting is satisfaction on the part of both parties with the arrangements for conducting a mediation meeting, including the designation of the participants to be in attendance at the meetings. Therefore, while either party in a dispute may wish to initiate or proceed with efforts at mediation prior to a formal due process hearing, either party has the right not to participate in the mediation process for whatever reason, including dissatisfaction with the participants slated to be in attendance. That is, mediation is voluntary and if a parent

or the public agency wishes to bring an individual to the mediation and the other party does not want the individual to attend, that party can elect not to proceed with mediation. This includes the attendance of attorneys. Neither the IDEA statute nor the regulations state whether parties may be represented by attorneys or advocates at mediation meetings. However, the presence of an attorney for a public agency could contribute to a potentially adversarial atmosphere at a mediation meeting. The same is true about the presence of an attorney accompanying the parents at the mediation meeting. Even if the attorney possessed knowledge or special expertise regarding the child, an attorney's presence may have the potential for creating an adversarial atmosphere that may not necessarily be in the best interests of the child. In some instances, where parties feel that they lack sufficient information or expertise, parties, particularly parents and children with disabilities, may wish to have their attorneys present to assist them in explaining their position and the process. Ultimately, the decision whether attorneys may attend mediation meetings rests with the State. However, given that participation in mediation is a voluntary process, if a party feels strongly about not attending mediation without his or her attorney and attorneys are not allowed to attend mediation under the State's rules, the party may choose not to attend mediation.

Question 14: May the child with a disability who is the subject of the mediation process attend the mediation?

Answer: Yes. Parents may choose to have the child with a disability who is the subject of the mediation process present for all or part of the mediation, at their discretion. For some youth with disabilities, observing and even participating in the mediation may be a self-empowering experience in which they can learn to advocate for themselves. The appropriateness of attending generally depends on the age and maturity of the child.

The IDEA also contains provisions that greatly strengthen the involvement of students with disabilities in decisions regarding their own futures. For example, a statement of transition services needs of the student under the applicable components of the student's IEP is provided for each student with a disability beginning at age 14 or younger, if appropriate, and a statement of transition services is provided for each student with a disability beginning no later than age 16 or younger, if appropriate. Because transition planning and transition services are designed to take into account the student's preferences and interests, it is appropriate for a student with a disability receiving these services to attend and participate in the mediation process.

34 CFR §§ 300.344(b)(1), and 300.344(b)(1) – (i), *see also*, 34 CFR §§ 300.347(b) - (c).

Finally, the IDEA gives States the authority to elect to transfer the rights accorded to parents under Part B to each student with a disability upon reaching the age of majority under State law. If the State elects to provide for the transfer of rights from the parents to the student at the age of majority, then the student will attend and participate in the mediation meetings. *See*, 34 CFR Part 300, Appendix A.

Question 15: May a State use IDEA funds for recruitment and training of mediators?

Answer: Yes. Under § 300.370 of Part B of the IDEA, among the activities for which a State may use funds it retains under § 300.602 are recruitment and training of mediators. Specifically, funds may be used for support and direct services, including technical assistance and personnel development and training, and to establish and implement the mediation process required by section 300.506, including paying for mediators and support personnel. 34 CFR § 300.370(a)(1) and (a)(3).

Question 16: May an SEA use IDEA funds to establish and implement the mediation process, including providing for the costs of mediators and support personnel?

Answer: Yes. An SEA may use IDEA funds to establish and implement the mediation process, including providing for the costs of mediators and support personnel. 34 CFR § 300.370(a)(3).

Question 17: May a public agency require a parent's participation in mediation?

Answer: No. Even though SEA's have successfully used mediation as an alternative method of dispute resolution between parents and districts, neither the IDEA nor its regulations allow a public agency to require a parent to participate in mediation prior to a due process hearing. However, a public agency may require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested third party who can discuss the benefits of mediation and encourage parents to use the process. This disinterested third party may be under contract with a parent training and information center or community parent resource center or an appropriate alternative dispute resolution entity. Nonetheless, mediation may not be used to deny or delay a parent's right to initiate an impartial due process hearing or deny any other rights afforded under Part B of the IDEA. 34 CFR §§ 300.506(d)(1), 300.506(d)(1)(i), 300.506(d)(1)(ii), and 300.506(d)(2).

Question 18: May parties to the dispute in a mediation process be required to sign a confidentiality pledge or agreement prior to the commencement of the process? If so, what is an example of such an agreement?

Answer: Yes. Parties to a mediation process may be required to sign a confidentiality pledge or agreement prior to the commencement of mediation. Furthermore, the IDEA regulations state that discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or

civil proceedings. 34 CFR § 300.506(b)(2)(6). An example of such a pledge or agreement follows:

- a. The mediator, the parties and their attorneys agree that they are all strictly prohibited from revealing to anyone, including a judge, administrative hearing officer or arbitrator the content of any discussions which take place during the mediation process. This includes statements made, settlement proposals made or rejected, evaluations regarding the parties, their good faith, and the reasons a resolution was not achieved, if that be the case. This does not prohibit the parties from discussing information, on a need-to-know basis, with appropriate staff, professional advisors, and witnesses.
- b. The parties and their attorneys agree that they will not at any time, before, during, or after mediation, call the mediator or anyone associated with the mediator as a witness in any judicial, administrative, or arbitration proceeding concerning this dispute.
- c. The parties and their attorneys agree not to subpoena or demand the production of any records, notes, work product, or the like of the mediator in any judicial, administrative, or arbitration proceeding concerning this dispute.
- d. If, at a later time, either party decides to subpoena the mediator or the mediator's records, the mediator will move to quash the subpoena. The party making the demand agrees to reimburse the mediator for all expenses incurred, including attorney fees, plus the mediator's then-current hourly rate for all time taken by the matter.
- e. The exception to the above is that this agreement to mediate and any written agreement made and signed by the parties as a result of mediation may be used in any relevant proceeding, unless the parties agree in writing not to do so. Information which would otherwise be subject to discovery, shall not become exempt from discovery by virtue of it being disclosed during mediation.

S. Rep. No. 105-17, 105th Cong., 1st Session. 46 p. 27-8 (1997).

The enforceability of a mediation agreement, like the enforceability of other binding agreements, will be based upon applicable State and Federal law. *See*, 34 CFR § 300.506 and Analysis of Comments and Changes, published as Attachment 1 to the final regulations, 64 Fed. Reg. at 12612 (Mar. 12, 1999).

Question 19: Must an agreement reached by the parties in a mediation process be in writing?

Answer: Yes. The IDEA requires that agreements reached by the parties to the dispute in a mediation process must be set forth in a written mediation agreement.

34 CFR § 300.506(b)(5). The requirement that mediation agreements reached by the parties be in writing does not apply to mediation not required by the IDEA.

Question 20: When is due process available under the IDEA?

Answer: The IDEA gives parents of children with disabilities and school districts under the final regulations of the IDEA the right to request due process hearings at any time the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, and SEAs must ensure that due process hearings are provided when requested. Even though SEAs have successfully used mediation as an alternative method of dispute resolution between parents and districts, neither the IDEA nor its regulations allow a district to require either party to participate in mediation prior to a due process hearing.