



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

July 31, 2020

Dear XXXXXXXXXXXX:

This letter addresses your November 8, 2019, electronic mail (email) correspondence to Rebecca Walawender, a member of my staff in the U.S. Department of Education (Department), Office of Special Education Programs (OSEP). In that correspondence you shared your communications with an official of the Texas Education Agency (TEA) concerning whether a parent may be required to sign a confidentiality agreement in order to participate in mediation under Part B of the Individuals with Disabilities Education Act (IDEA). In your communication with TEA, a TEA official informed you that although a confidentiality pledge is not required, a school district may withdraw from the mediation process if a parent refuses to sign such an agreement. You contacted OSEP to request clarification regarding whether a public agency, in this case a local educational agency, may condition its participation in mediation on a parent's agreement to sign a confidentiality pledge. We regret the delay in responding.

We note that section 607(d) of IDEA prohibits the Secretary from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. This response represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented and does not establish a policy or rule that would apply in all circumstances.

Under IDEA, discussions that occur during mediation sessions must remain confidential. 34 C.F.R. § 300.506(b)(6) and (8). Therefore, a parent's or public agency's participation in the mediation process may not be conditioned on the party's agreement to sign a confidentiality pledge. IDEA and its implementing regulations require public agencies to establish and implement procedures to allow parties to resolve disputes involving any matter under IDEA and its implementing regulations, including matters arising prior to the filing of a due process complaint, through a mediation process. 20 U.S.C. 1415(e)(1) and 34 C.F.R. § 300.506(a). The public agency must ensure, among other requirements, that the mediation process is voluntary on the part of the parties. 34 C.F.R. § 300.506(b)(1)(i). Additionally, mediation may not be used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of IDEA. 34 C.F.R. § 300.506(b)(1)(ii). The goal of mediation

is for the parties to resolve the dispute and execute a legally binding written agreement reflecting that resolution.

In its July 2013 “Questions and Answers on IDEA Part B Dispute Resolution Procedures” (available at <https://sites.ed.gov/idea/idea-files/osep-memo-and-qa-on-dispute-resolution/>), OSEP responded to an inquiry asking whether parties to the mediation process may be required to sign a confidentiality pledge or agreement. That question and answer, which is restated below, remains the Department’s position:

Question A-26: May parties to the mediation process be required to sign a confidentiality pledge or agreement prior to, or as a precondition, to the commencement of the mediation process?

Answer: No. In the Notice of Proposed Rulemaking implementing the IDEA Amendments of 2004, the Department included a provision that would have required parties to a mediation to sign a confidentiality pledge, without regard to whether the mediation ultimately resolved the dispute. 70 FR 35870 (June 21, 2005). This proposed provision was based on Note 208 of Conf. Rpt. (Conference Report) No. 108-779, p. 216 (2004).¹ However, the Department decided to remove this proposed provision when the final Part B regulations were published in 2006 based on the statutory requirement in section 615(e)(2)(G) that discussions that occur during the mediation process must remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. 71 FR 46696 (August 14, 2006).

Additionally, if the parties resolve a dispute through the mediation process, as noted above, 34 C.F.R. § 300.506(b)(6)(i) requires that the legally binding written agreement contain a statement that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. 34 C.F.R. § 300.506(b)(6)(i). This is so even if the parties do not enter into a mediation agreement. However, nothing in these regulations is intended to prevent States from allowing parties to sign a confidentiality pledge to ensure that discussions during the mediation process remain confidential, irrespective of whether the mediation results in a legally binding written agreement resolving the dispute. 71 FR 46696 (August 14, 2006).

The Department’s position that States may not require parties to sign a confidentiality pledge is reinforced by the Department’s decision in the 2006 final Part B regulations to remove a proposed regulation that would have required parties to sign a confidentiality pledge. 71 Fed. Reg. at 46696 (Aug. 14, 2006). In addition to the provision that must be included in a mediation agreement, 34 C.F.R. § 300.506(b)(8) also provides 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 proceeding of any Federal court or State court of a State receiving assistance under Part B of IDEA. Accordingly, the requirement that discussions that occur during mediation remain confidential is fully applicable regardless of whether the parties sign a separate confidentiality pledge or agreement prior to commencing the mediation process. We recognize

¹ Conference Report refers to the joint explanatory statement of the Committee of Conference. This report accompanied HR 1350, the bill to reauthorize the IDEA in 2004.

that mediation is voluntary on the part of the parties, but it is impermissible under IDEA for a public agency to condition a parent's participation in mediation on the parent's signing a confidentiality pledge. While nothing in IDEA is intended to prevent States from allowing parties to sign a confidentiality pledge, public agencies may not condition their participation in mediation on such an agreement, because such a requirement is counter to the voluntary nature of the mediation process.

By copy of this letter we are notifying TEA of your inquiry and our response. OSEP staff will follow up separately with TEA officials regarding this matter.

If you have any further questions, please do not hesitate to contact Ms. Walawender at 202-245-7399 or by email at Rebecca.Walawender@ed.gov.

Sincerely,

/s/

Laurie VanderPloeg
Director
Office of Special Education Program

cc: Justin Porter, Texas Education Agency