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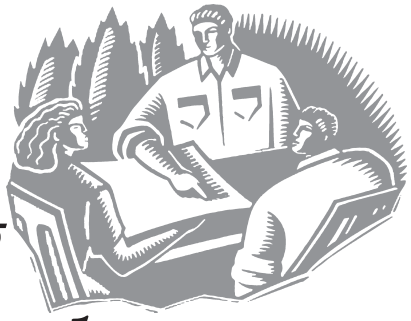

Implementing the Mediation Requirements of IDEA '97

A guide developed for
*THE CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION (**CADRE**)*

RICHARD W. ZELLER, PH.D.

January, 2001

This document was published in January 2001. References to the law and regulations are now outdated. Refer to the CADRE website for the most recent information on the reauthorization of IDEA. www.directionservice.org/cadre/idea

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CADRE

Helping Parents and Educators
Create Solutions That Improve Results
for Students with Disabilities

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The U.S. Department of Education, Office of Special Education Programs (OSEP) has reviewed this document for consistency with the Individuals with Disabilities Education Act (IDEA, P.L. 105-17) and the final regulations implementing the IDEA published on March 12, 1999. However, the development of the document was not supervised nor is it endorsed by the U.S. Department of Education, Office of Special Education Programs (OSEP) or other agencies, so adherence to practices it suggests does not alone ensure compliance. Furthermore, individual state policies may extend beyond Federal requirements. Be sure to check with your local or state special education agency for the specific ways in which your state meets the Federal requirements and for any additional state requirements and supports related to mediation and other forms of dispute resolution.

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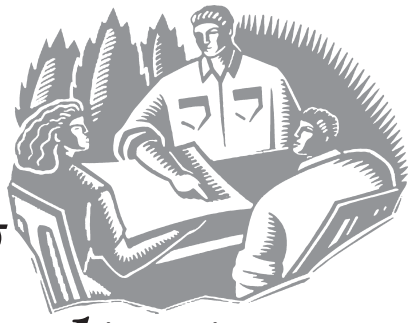

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TABLE OF CONTENTS

INTRODUCTION

In June 1997, Congress reauthorized the Individuals with Disabilities Education Act (IDEA), Public Law 105-17. This Act, while retaining the procedural protections of the earlier statute, clearly calls for more collaborative decision-making and problem solving by schools and parents. The new law established a requirement that states offer mediation as a way for parents and schools to settle disputes. These and other provisions of the Act, the Senate Report (S. Rep. No. 105-17, 105th Congress, 1st Session, 1997), and the House Report (H. R. Rep. No. 105-95, 105th Congress, 1st Session, 1997) signal a congressional intent to encourage more collaborative decision-making by parents and schools when problems may be present:

> *"The committee is aware that, in States where mediation is being used, litigation has been reduced, and parents and schools have resolved their differences amicably, making decisions with the child's best interest in mind. It is the committee's strong preference that mediation become the norm for resolving disputes under IDEA."*
>
> **S. Rep. No. 105-17, 105th Congress, 1st Session, p. 26 (1997)**
> **H. R. Rep. No. 105-95, 105th Congress, 1st Session, p. 106 (1997)**

What prompted this attention to mediation? In 1975, Congress passed the Education for All Handicapped Children Act (P.L. 94-142) granting children with disabilities the right to a free appropriate public education. The law (known since 1990 as the Individuals with Disabilities Education Act, or IDEA) included provisions to ensure that parents are active participants in decisions about their child's educational program. These provisions included both collaborative decision-making rights (i.e., participation by parents with educators in the development of a child's Individualized Education Program, or the IEP), and the right of parents to challenge decisions about their child's educational program.

While the collaborative decision-making process of the IEP was intended to characterize parent-school relationships, resolution of disputes often has relied on the formal, more adversarial means included in Federal law and regulations:

> **Impartial Due Process Hearing** (34 C.F.R. §§300.507-300.514): The parent or the public agency may initiate a hearing if they are unable to agree on any matter relating to the identification, evaluation, or educational placement of the child with a disability, or the provision of a free appropriate public education (FAPE) to the child (34 C.F.R. §300.507(a)(1)-(a)(2)). Also, the parent or public agency may initiate a hearing at any time a 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."* (34 C.F.R. §300.507(a)(1)) States may establish their own procedures for impartial due process hearings, provided they are consistent with the Federal requirements. The impartial due process hearing may be described as a quasi-judicial process, in which a hearings officer receives evidence, provides for the examination and cross-examination of witnesses by each party, and then issues a report of findings of fact and decisions. In some states, local hearing decisions may be appealed for review by the state. If either party is dissatisfied with the final decision, the issue may be taken to a court of law. Following this process, the parties–the child's parents and the school personnel who educate the child–are usually expected to work together for the future benefit of the child.

In some cases, the impartial due process produces a clear result, but the relationships of the parties may suffer significant damage.

State Complaint Procedures (34 C.F.R. §§300.660-300.662): Parents and others may also file a "signed written complaint" with the State Education Agency (SEA), if they believe that a public agency (i.e., a local school district) is violating a provision of IDEA. In such cases, the SEA has 60 days in which to carry out an independent on-site investigation if the SEA determines that an investigation is necessary. During the time limit of 60 days after a complaint is filed, the SEA shall give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint, review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the IDEA, and the SEA shall issue a written decision to the complainant that addresses each allegation in the complaint. Also, the written decision will contain findings of fact and conclusions and the reasons for the SEA's final decision. In some cases, parents simultaneously file due process requests and written state complaints.

Most often in impartial due process hearings and state complaint procedures, one party prevails over the other in the decision. However, generally, a parent who files an IDEA claim need not prevail on every aspect of the claim in order to be declared a prevailing party for attorney's fee claim purposes. The prevailing party in a due process hearing may seek and be awarded reasonable attorney's fees by a court. In 1990, Congress acted to clarify the conditions under which parents could claim reimbursement for the legal costs of due process.

Many parents and school personnel find the impartial due process procedures to be exhausting, expensive, and damaging to the relationships needed for future collaborative work. Most requests for due process never go to the hearing stage; parents (most often) withdraw hearing requests when districts act to address the issues or when the burden of completing the hearing process seems too great (Morvant & Zeller, 1997). When hearings do come to fruition, prevailing parties tend to see the hearings processes and decisions as fair, while losing parties often see the processes as flawed and biased (Morvant & Zeller, 1997). Many who have participated in impartial due process hearings, even if they "won," say the cost was too high (Goldberg and Kuriloff, 1991).

While these formal procedures remain in law as necessary provisions to protect individual rights, mediation offers hope for more collaborative decision-making by parents and schools. Both Congress and the field are interested in using more collaborative approaches to resolving disputes in special education. Similar efforts have been underway for several years in business, industry, government agencies, and neighborhoods. Mediation and other collaborative dispute resolution methods emphasize cooperation, negotiation, and mutual agreement in the resolution of differences. Such collaboration is in perfect harmony with the broader intent of IDEA: to help schools and parents work together..."*amicably, making decisions with the child's best interest in mind*" (S. Rep. No. 105-17, 105th Congress, 1st Session, p. 26, 1997; and 105th Congress, 1st Session, No. 105-95, p. 106, 1997).

This document is intended primarily to assist states in implementing the mediation requirements in IDEA. Although the formal responsibility for ensuring compliance with mediation requirements under IDEA rests with the State, local school districts, parents, advocates and mediators may also find this document useful in understanding the legal requirements for mediation under IDEA. The legal standards for mediation under IDEA are found at 20 U.S.C. 1415(e) and in the Code of Federal Regulations at 34 C.F.R. §300.506 (published in the *Federal Register*, March 12, 1999). For this document, we use the regulations as the legal standard for states and local systems providing mediation. Any citation from the regulations, the statute, or from the accompanying Senate and House Report (S. Rep. No. 105-17, 105th Congress, 1st Session, p. 26, 1997; and H. R. Rep. No. 105-95, 105th Congress, 1st Session, p. 106, 1997) are *shown in this sans serif italicized font.*

The mediation requirements from the regulations (34 C.F.R. §300.506) are reproduced in their entirety in Table 1.

Practice Considerations and Implementation of the IDEA Regulations

In this document, the use of the term "mediation" means "mediation under 34 C.F.R. §300.506." In other words, mediation is used here very narrowly to refer only to the conditions imposed on Federally required mediation. The minimum legal requirements for mediation by no means reflect all a public agency could do in order to work collaboratively with parents. Sound educational practice necessitates far more active work with parents as partners, making formal mediations necessary only in cases where other collaboration has not worked. State legislatures and state and local systems often seek to limit state law and regulation to the minimum requirements of Federal law. While this is understandable, such legal minimalism need not confine dispute resolution practice solely to the mediation requirements of IDEA. While IDEA *requires* that mediation be provided at a minimum whenever a hearing is requested and sets standards for mediation under those conditions, common sense suggests that dispute resolution practice goes beyond the limits of the law to focus on collaborative agreement in all areas of educational planning and decision-making. An inherent part of collaboration is resolving differences to reach agreement. Certainly, not every disagreement in a collaborative relationship requires a formal mediation or other formal dispute resolution. Practice, by its nature, is more than a rigid application of legal mandates. While this document may help states provide mediation under the IDEA, it is not intended as a complete guide to all types of approaches to dispute resolution.

TABLE 1: IDEA Regulations on Mediation

Main Regulatory Provision
for Mediation Under IDEA 97

Sec. 300.506 Mediation.

(a) General. Each public agency shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in Sec. 300.503(a)(1) to resolve the disputes through a mediation process that, at a minimum, must be available whenever a hearing is requested under Secs. 300.507 or 300.520-300.528.

(b) Requirements. The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process-- (i) Is voluntary on the part of the parties; (ii) Is not used to deny or delay a parent's right to a due process hearing under Sec. 300.507, or to deny any other rights afforded under Part B of the Act; and (iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2)(i) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. (ii) If a mediator is not selected on a random (e.g., a rotation) basis from the list described in paragraph (b)(2)(i) of this section, both parties must be involved in selecting the mediator and agree with the selection of the individual who will mediate.

(3) The State shall bear the cost of the mediation process, including the costs of meetings described in paragraph (d) of this section.

(4) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(5) An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.

(6) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings, and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(c) Impartiality of mediator.

(1) An individual who serves as a mediator under this part-- (i) May not be an employee of- (A) Any LEA or any State agency described under Sec. 300.194; or (B) An SEA that is providing direct services to a child who is the subject of the mediation process; and (ii) Must not have a personal or professional conflict of interest.

(2) A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described under Sec. 300.194 solely because he or she is paid by the agency to serve as a mediator.

(d) Meeting to encourage mediation.

(1) A public agency may establish procedures to require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party-- (i) Who is under contract with a parent training and information center or community parent resource center in the State established under section 682 or 683 of the Act, or an appropriate alternative dispute resolution entity and (ii) Who would explain the benefits of the mediation process, and encourage the parents to use the process.

(2) A public agency may not deny or delay a parent's right to a due process hearing under Sec. 300.507 if the parent fails to participate in the meeting described in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1415(e))

This section organizes the requirements for mediation under IDEA into logically related areas: mediator standards, mediator selection, mediation process and conditions, encouraging mediation, and attorney participation in mediation (not Federally regulated). Each of these areas is described below, with related citations from the regulations and questions to assist states to assess whether their systems have addressed each of the requirements. A full list of possible self-assessment questions is summarized in Appendix I.

Mediator Standards

> The mediation process must be conducted *"by a qualified and impartial mediator who is trained in effective mediation techniques. The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services."* 34 C.F.R. §300.506(a)(1)(i)-(2)(i)
>
> An impartial mediator means that the... *"individual who serves as a mediator... may not be an employee of any LEA or any State agency described under §300.194; or 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 C.F.R. §300.506(c)(1)

Self-assessment Questions:

- Does the State have a method for determining whether a mediator is *trained in effective mediation techniques*?
- Does the State have a method for determining whether a mediator is *knowledgeable in laws and regulations* relating to the provision of special education and related services?
- Does the State ensure *that an individual who serves as a mediator may not be an employee of an LEA or any State agency or 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*?

Practice Implications:

The Federal Office of Special Education Programs has not issued regulations regarding how states address mediator skills and training, or mediator knowledge in laws and regulations. States must ensure that a "qualified" mediator conducts the mediation, but what that constitutes is up to the state as long as the Federal requirements are met. States may, for example, have more than a single approach to determining mediator qualifications, may require a minimum level of training, may use tests to assess knowledge of special education laws and regulations, etc. Whatever approaches it uses, a state should be able to explicitly identify how each mediator qualifies in terms of training in mediation techniques, and knowledge of the laws and regulations.

An individual who serves as a mediator may not be an employee of any LEA or any State agency or an SEA that is providing direct services to a child who is the subject of the mediation process. A mediator also must not have a personal or professional conflict of interest. The regulatory provisions regarding the impartiality of mediators and the requirement of specialized expertise in laws and regulations relating to the provision of special education and related services are intended to be more stringent than the Federal requirements for impartial

hearing officers to ensure that mediation is a more attractive option for parents and an effective option for both parties. States have an interest in the success of mediation to resolve differences. States, for example, may use evaluation of mediator performance (satisfaction of the parties, durability of the agreement) as a part of their ongoing assurance of mediator qualifications. Any system of evaluation must be sensitive to the confidential nature of the mediation process.

Some states have contracted with mediation services that are involved in a variety of fields and that tailor a mediation service for special education. The use of mediation professionals may help ensure that mediators are well trained in mediation techniques, but extra attention may need to be given to ensure that mediators also know the law and regulations. Initial training, regular refresher courses, and criterion-based tests may help ensure that mediators are knowledgeable about the law.

Mediator Selection

> *The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. If a mediator is not selected on a random (e.g., a rotation) basis from the list..., both parties must be involved in selecting the mediator and agree with the selection of the individual who will mediate.* 34 C.F.R. §300.506(a)(2)(ii).

Self-assessment Questions:

- Does the State maintain *a list of qualified, knowledgeable, and impartial mediators*?
- Does the State have a method for establishing that a mediator *does not have a personal or professional conflict of interest with respect to the individual case* for which the mediator may be selected?
- Does the State *select the mediator* for a given case on a *random basis* from the state list?
- *If* the State selects mediators on a *non-random basis*, does the State have procedures to *ensure that both parties agree* with the selection of the individual who will mediate?

Practice Implications:

Impartiality of the mediator may be assured, to some degree, by the statutory and regulatory limits on who may be appointed. However, a given mediation still may present other conflicts of interest (i.e., a potential mediator may know one of the parties). There are no Federal regulations dictating how such conflicts may be identified. As a general rule, states have conflict of interest provisions in law or practice that will cover these situations.

Completely random assignment of a mediator may be difficult in geographically large states. Some mediations may involve more complex issues of disability, law, and service delivery than others. States, therefore, may wish to use sublists (i.e., by geographic area, by level of specialized knowledge, etc.) when assigning a mediator to a specific case. Some states have used an approach where the parties are provided a list of three potential mediators, with each party allowed to strike one name from the list. If the parties agree to this approach, this could be one non-random basis for selection. If either party were opposed to the remaining mediator, proceeding with mediation would be difficult and another method of agreeing to the selection of a mediator should be used.

Mediation Process and Conditions

> *The procedures* [for mediation required under IDEA] *must meet the following requirements:*
> • [The State must make available to parents a process] *...to resolve the disputes through a mediation, ...at a minimum, ...whenever a hearing is requested.*
> • *The procedures must ensure that the mediation process is voluntary on the part of the parties and is not used to deny or delay a parent's right to a due process hearing...or to deny any other rights afforded under Part B of the Act.*
> • *The State shall bear the cost of the mediation process, including the costs of meetings...*
> • *Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.*
> • *An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.*
> • *Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings, and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.* 34 C.F.R. §300.506(b)

Self-assessment Questions:

- Does the State have a procedure to i*nform parents of the availability of mediation whenever a due process hearing is requested*?
- Does the State *pay the cost* of the mediation process?
- Does the State establish the *timeline, date, and location* for mediation to ensure that it is *convenient to both parties* and meets Federal requirements to ensure *that other rights under Part B are not delayed*?
- Does the State provide *guidance to mediators regarding* how to prepare a *written mediation agreement*?
- Does the State have a process (i.e., notice of policy, format for a confidentiality pledge) to *ensure that mediation discussions are confidential*?

Practice Implications:

States with one-tier due process systems typically receive requests for a due process hearing directly. In those states, offering mediation upon receipt of such a request is clearly the state's responsibility. In some states with two-tiered due process systems, hearing requests at tier one may be received at the local level and not reported to the state. In such systems, states need to ensure that local districts inform parents of the option for mediation. From a practical standpoint, it may make sense for these states to require LEAs to notify the state of the hearing request and to have a procedure to ensure that the offer of mediation is made.

State mediation systems are responsible for ensuring that the date and location for mediation are convenient to both parties. In most states, this will mean that a state office (or contracted mediation service) will be responsible for communicating with the parties to arrange these details.

The Law requires written mediation agreements. There is no regulatory guidance as to what constitutes a written agreement. In the Analysis of Comments and Changes published with the regulations (34 C.F.R. §300.506 and Analysis of Comments and Changes Published as Attachment 1 to the final regulations at *Fed. Reg.* at 12612, March 12, 1999), OSEP states: *"The enforceability of a mediation agreement, like the enforceability of other binding agreements, including settlement agreements, will be based upon applicable State and Federal law."* States may have an interest in providing mediators guidance as to what constitutes a possible format to be used for a written mediation agreement in keeping with other applicable law.

Whether or not the state chooses to establish a signed agreement regarding confidentiality, discussions that occur during mediation must be confidential and may not be used as evidence in either impartial due process hearings nor in civil court actions. A signed agreement is one way to ensure that the parties to the mediation have notice of and understand this requirement.

Encouraging Mediation

> *A public agency may establish procedures to require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party...who would explain the benefits of the mediation process, and encourage the parents to use the process.* [The disinterested party may be]*...under contract with a parent training and information center or community parent resource center in the State established under section 682 or 683 of the Act, or an appropriate alternative dispute resolution entity.*
> 34 C.R.F. 300.506(d)(1)
>
> *A public agency may not deny or delay a parent's right to a due process hearing under §300.507 if the parent fails to participate in the meeting described in paragraph (d)(1) of this section.*
> 34 C.R.F. 300.506(d)(2)

Self-Assessment Questions:

- Does the State have a ***procedure for offering parents a meeting to explain the benefits*** of mediation and encourage their participation?
- If so, does a "disinterested party" conduct the meeting (a parent training and information center, a community parent resource center, or other appropriate alternative dispute resolution entity)?
- Does the State ***ensure that the mediation process***, including the meeting described above, ***does not delay or deny the parent's right*** to a due process hearing?

Practice Implications:

Some parent training and information centers (PTIs) have sought agreements with their state departments to conduct these mediation information/encouragement meetings. Other PTIs have avoided being put in the position of calling on parents who may have rejected the idea of mediation in favor of a due process hearing. The particular conditions of each state differ enough that no single prescription makes sense. States might consider a "disinterested party" to be one that has no financial or other interest in the use of mediation or due process hearings to resolve disputes.

The requirement to stick to due process timelines may mean that mediation must be arranged and provided on very short notice, unless both parties have agreed to an extension of the timeline. It may be unrealistic to expect that mediations will always be completed in a single session. Some states have explicitly noted that multiple sessions may be needed. In any case, the due process "clock" is ticking as soon as the request is filed and the mediation generally must come early in that period if it is to have any ameliorating effect on the dispute. States need to determine how the outcome from mediation is communicated to the due process system, particularly if the school and parents reach an agreement that removes the need for an impartial due process hearing.

Attorney participation in mediation is not Federally regulated

The Congress expressed an interest in allowing states to decide this issue in the Senate Report accompanying the final IDEA reauthorization:

> *"The committee believes that, in States where mediation is now offered, mediation is proving successful both with and without the use of attorneys. Thus, the committee wishes to respect the individual State procedures with regard to attorney use in mediation, and therefore, neither requests nor prohibits the use of attorneys in mediation."*
>
> **S. Rep. No. 105-17, 105th Congress, 1st Session, p. 26 (1997)**
> **H. R. Rep. No. 105-95, 105th Congress, 1st Session, p. 106 (1997)**

Self-assessment Questions:

- Does the State have a *policy regarding the participation of attorneys* in mediation?
- *How does the State ensure that other conditions* (i.e., confidentiality, written agreements) *are met*?

Practice Implications:

States may regulate on this issue and, as Congress noted in the Senate Report explicitly, mediation has been successfully conducted both with attorneys present and in cases where attorneys have not been allowed. (S. Rep. No. 105-17, 105th Congress, 1st Session, p. 26, 1997; and H. R. Rep. No. 105-95, 105th Congress, 1st Session, p. 106, 1997)

States vary in terms of how they have regulated on the issue of attorney involvement. Some states allow attorneys in any mediation, while others allow attorneys only in formal IDEA mediations (those offered after an impartial due process hearing has been requested). Other states allow attorney involvement in mediation, but only if both parties agree to the arrangement. In some cases, the parent or district must provide notice of intent to involve an attorney to the other party prior to mediation. Still other states have created a category of participants in mediation they call "assisting parties," which includes attorneys. "Assisting parties" are allowed to advise their clients, but are not allowed to participate directly in the mediation discussions (i.e., they may not question or examine the opposing party in a mediation). State approaches to attorney involvement may vary. However, given that participation in mediation is voluntary, if a party feels strongly about the involvement or non-involvement of attorneys in a particular mediation, the party may choose not to attend mediation.

CONCLUSION

States can provide high quality mediation services under IDEA that capably address disputes between families and school districts. CADRE and most other observers recognize the additional need for flexible, collaborative approaches that can prevent conflict and provide timely response to disputes when they occur. However, the provision of a quality mediation process as a last step before parties proceed to an impartial due process hearing can save time and resources, and can help rebuild the relationship between a family and a school that is critical to meeting a child's educational needs.

REFERENCES

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APPENDIX I:

Self-Assessment Questions

- ☐ Does the State have a method for determining whether a mediator is *trained in effective mediation techniques*?
- ☐ Does the State have a method for determining whether a mediator is *knowledgeable in laws and regulations* relating to the provision of special education and related services?
- ☐ Does the State ensure *that an individual who serves as a mediator may not be an employee* of an LEA or any State agency or 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*?
- ☐ Does the State maintain *a list of qualified, knowledgeable, and impartial mediators*?
- ☐ Does the State have a method for establishing that a mediator *does not have a personal or professional conflict of interest with respect to the individual case* for which the mediator may be selected?
- ☐ Does the State *select* the mediator for a given case on a *random basis* from the state list?
- ☐ *If* the State selects mediators on a *non-random basis*, does the State have procedures to *ensure that both parties agree* with the selection of the individual who will mediate?
- ☐ Does the State have a procedure to *inform parents of the availability of mediation whenever a due process hearing is requested*?
- ☐ Does the State *pay the cost* of the mediation process?
- ☐ Does the State establish the *timeline, date, and location* for mediation to ensure that it is *convenient to both parties* and meets Federal requirements to ensure *that other rights under Part B are not delayed*?
- ☐ Does the State provide *guidance to mediators regarding* how to prepare a *written mediation agreement*?
- ☐ Does the State have a process (i.e., notice of policy, format for a confidentiality pledge) to *ensure that mediation discussions are confidential*?
- ☐ Does the State have a *procedure for offering parents a meeting to explain the benefits* of mediation and encourage their participation?
- ☐ If so, *does a "disinterested party" conduct the meeting* (a parent training and information center, a community parent resource center, or other appropriate alternative dispute resolution entity)?
- ☐ Does the State *ensure that the mediation process*, including the meeting described above, *does not delay or deny the parent"s right* to a due process hearing?
- ☐ Does the State have a *policy regarding the participation of attorneys* in mediation?
- ☐ *How does the State ensure that other conditions* (i.e., confidentiality, written agreements) *are met*?

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

NOV 30 2000

CONTACT PERSON:
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Name: Tracy Justesen
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OSEP: 01-5

MEMORANDUM

To: Chief State School Officers

From: Kenneth W. 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

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 18 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.
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> **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.

CADRE
Consortium for Appropriate Dispute Resolution in Special Education

The Consortium for Appropriate Dispute Resolution in Special Education (CADRE) works to increase the nation's capacity to effectively resolve special education disputes, reducing the use of expensive adversarial processes.

CADRE works with state and local education and early intervention systems, parent centers, families and educators to improve programs and results for children with disabilities.

CADRE is funded by the Office of Special Education Programs at the US Department of Education to serve as the National Center on Dispute Resolution in Special Education.

CADRE's Priorities

Identify effective, cost-beneficial dispute resolution practices and support their implementation

Enhance collaboration between education/early intervention agencies and parent organizations

Promote improved problem-solving skills across stakeholder groups

Assist states to implement the dispute resolution provisions of IDEA '04

Support integration of dispute resolution management and improved state system performance

Compile State Performance Plan data and information on the characteristics of state systems

CADRE