Analysis of Comments, Discussions and Changes from Attachment 1

From "Attachment 1-Analysis of Comments and Changes " (published with the Final Regulations for IDEA 97, in the Federal Register, pp. 12611-12612, 12 March 1999)

Mediation (ß300.506)

***Comment*:** Several commenters asked that the terms "SEA" and "LEA" be used in lieu of "public agency" since the statute uses those terms. There were also requests for a clarification of the State's responsibility for the costs of the mediation process.

There were a few requests for clarification of who may be mediators, such as whether or not former LEA employees would be able to be mediators. There were comments asking for more restrictions on who could be a mediator and comments asking for fewer restrictions, especially where a public school district already has certain mediators under state law or regulation. The latter commenters believe the restrictions should only address employees of an agency that is providing direct services to a child who is the subject of the mediation or any state agency described in §300.20.

There was also the suggestion that LEA employees be permitted to serve as mediators, however, either party would have the right to reject such selection. The commenters pointed out that there is no similar prohibition against LEA employees being hearing officers and several questioned whether the restrictions were therefore necessary. Some commenters suggested that the regulation make clear that multiple mediators or mediation panels are allowed, i.e., that a single mediator is not required for each mediation.

Other comments recommended that Note 1 be deleted, while others asked that it be included in the text of the regulation. With regard to Note 1, for situations in which agreement on a mediator could not be reached, commenters sought additional guidance in the regulation.

Other suggestions for the mediation process included promoting mediation even before a due process hearing is requested and allowing an LEA to select a mediator who it believes is best able to resolve issues in dispute. There were comments that mediation should be allowed to occur via telephone when necessary. Several commenters asked that the agreement reached in mediation be added to the child's IEP as soon as possible after the agreement is reached, however not later than 10 days from the agreement. Commenters also requested that the regulation specify that the written mediation agreement would be as enforceable as a due process hearing decision, and that mediation discussions may be disclosed in any proceeding brought to enforce a mediation agreement.

Some comments stated that there appeared to be a conflict between §§300.506(d)(1) and 300.506(d)(2). The former allows a public agency to require parents who elect not to go to mediation to meet with a disinterested party to learn about the mediation process. The latter states that if a parent does not participate in the informational meeting regarding mediation the public agency may not deny or delay the parent's right to due process hearing. The comments

suggested changing §300.506(d)(1) to state that the procedures may "request" not "require" the parents to learn about mediation. A few comments requested a specific definition of the term "disinterested party" and parent information and training centers, as well as clarification of any supervision required over disinterested parties. There were also comments which asked that LEAs be required to mediate if the parents agree, as well as be required to attend a mediation informational meeting if it chooses not to mediate.

***Discussion*:** Mediation is an important alternative system for resolution of disputes under Part B. However, in order for mediation to be effective, it must be an attractive alternative to both public agencies and parents and it must be an impartial system which brings the proper parties into a confidential discussion of the issues and allows for a binding agreement that resolves the dispute.

The statute clearly states that the option of mediation must be available whenever a due process hearing is requested. No further requirement would be added to the regulations. However, States or other public agencies are strongly encouraged to offer mediation or other alternative systems of dispute resolution prior to the filing of a request for a due process hearing, and whenever a dispute arises.

An expanded use of mediation should enable prompt resolution of disputes and lead to a decrease in the use of costly and divisive due process proceedings and civil litigation. Mediation may also be useful in resolving State complaints under §§300.660-300.662.

The term "public agency" in the regulation appropriately includes State and local educational agencies as well as other agencies in the State that may have responsibility for the education of children with disabilities because it ensures access to the mediation process, regardless of the agency that provides educational services. The requirement that the State bear the cost of the mediation process is clearly set out in the regulation; however, the regulation should be revised to correctly refer to the meetings to encourage the use of mediation. In addition, the potential savings of mediation, when compared to litigation, make it an attractive, low-cost option for most public agencies.

While there is nothing in the Part B regulations that precludes parents and LEA employees from attempting to resolve disputes through an informal process, the use of current LEA employees as mediators would make mediation a much less attractive alternative to parents. 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. The use of a single mediator in the mediation process is important for clear communication and accountability.

Paragraph (b)(1)(iii) of this section, which repeats statutory language, is clear that each mediation be conducted by one mediator, as opposed to a panel or multiple mediators.

Another factor that will determine the success of mediation within a State is the selection process for mediators. It is important to note that with respect to paragraph (b)(2) of this section, the Senate and House Committee Reports on Pub. L. 105-17 include the following statement:

...the bill provides that the State shall maintain a list of individuals who are qualified mediators. The Committee intends that whenever such a mediator is not selected on a random basis from that list, both the parents and the agency are involved in selecting the mediator, and are in agreement with the individual who is selected. (S. Rep. No. 105-17, p. 27 (1997); H. Rep. No. 105-95, p. 106 (1997).)

The success of a mediation system will be closely related to both parties' trust and commitment to the process. The first test of that process will be the selection of the mediator. Parties that mistrust the mediator selection process may be less likely to reach agreement on substantive issues. Therefore, reflecting the language of the Committees' reports on this topic, a change should be made to the regulation to specify that if a mediator is not selected on a random basis from the State-maintained list, both parties are involved in selecting the mediator and are in agreement with the selection of the individual who will mediate.

Like hearing officers, mediators must be able to be paid by the State, without impacting their impartiality. Language similar to that used for impartial hearing officers should be added to the regulation to clarify that even though a mediator is paid for his or her services as a mediator, such payment does not make that mediator an employee for purposes of impartiality.

The regulatory requirement for the use of a qualified mediator instructed in effective mediation techniques will ensure that decisions about the effectiveness of specific techniques, such as the need for face-to-face negotiations, telephone communications, or IEP implementation provisions, will be based upon the mediator's independent judgment and expertise. Therefore, it is not necessary to regulate on these issues.

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. With regard to the provision in paragraph (b)(6) of this section that mediation discussions must be confidential and may not be used in any subsequent due process hearings or civil proceedings, the Senate and House Committee Reports on Pub. L. 105-17 note that "nothing in this bill shall supersede any parental access rights under the Family Educational Rights and Privacy Act of 1974 or foreclose access to information otherwise available to the parties." (S. Rep. No. 105-17, p. 27 (1997); H. Rep. No. 105-95, p. 107 (1997)). The Reports also include an example of a confidentiality pledge, which makes clear that the intent of this provision is to protect discussions that occur in the mediation process from use in subsequent due process hearings and civil proceedings under the Act, and not to exempt from discovery, because it was disclosed during mediation, information that otherwise would be subject to discovery.

Regarding the perceived conflict between §300.506(d)(1) and (d)(2), the mediation process, including meetings to discuss the benefits of mediation, should not be used to deny or delay parents' due process hearing rights. The purpose behind §300.506(d)(2) is to ensure that in situations where parents are unwilling or unable to cooperate with a public agency regarding a

meeting to discuss the benefits of mediation, there is still a timely resolution of the due process hearing. In general, a hearing officer should not extend the timelines for a due process hearing based on the fact that there is a pending mediation in the case unless both parties have agreed to that extension. 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. While the State or local educational agency may require that the parent attend the meeting to receive an explanation of the benefits of mediation and to encourage its use, a parent's failure to attend this meeting prior to the due process hearing should not be used to justify delay or denial of the hearing or the hearing decision.

It is not necessary to define the terms "parent training and information centers" or "community parent resource center" since they are established by statute. To allow flexibility with regard to the designation of a "disinterested party" by the parent organizations or an appropriate alternative dispute resolution entity, no definition would be provided. Consistent with the general decision to remove all notes from these final regulations, Notes 1 and 2 would be removed.

***Changes*:** A new paragraph (b)(2)(ii) is added to specify that the mediator be selected from the list on a random basis, such as a rotation, or that both parties are involved in selecting the mediator and agree with the selection of the individual who will mediate. Notes 1 and 2 have been removed.

Paragraph (b)(3) has been revised to refer to the meetings to encourage the use of mediation.

Another new paragraph (c)(2) is added to clarify that payment for mediator services does not make the mediator an employee for purposes of impartiality.