

SPECIAL
EDUCATION
CONSIDERATIONS
FOR MEDIATORS

IDEA Veteran Mediator
Training

New York State Education
Department


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The Critical Importance of Building Trust



- The ability to build trust is perhaps the most important ingredient to success as a mediator.
- Trust opens the door to honesty, effective “reality testing” and willingness to collaborate.



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Essential Building Blocks to Creating Trust



Understanding the unique dynamics and emotions inherent in the Special Education process:

- Parents may have heightened emotions due to their child’s vulnerable situation and frustration over the district’s unwillingness to provide the level of supports they think are promised under the IDEA.
- School staff may not be aware of the value of a skilled mediator and may feel the parent is not appreciative of the challenges they face meeting the substantial and varied needs of their students.



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Essential Building Blocks to Establishing Trust



Presenting an effective opening statement:

- An opportunity to convince the participants to have confidence in the process **and** in the mediator's ability to effectively manage the process.
- Informs the participants of the nature of the process and a mediator's role in it.

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Preparing an Effective Opening Statement



Keep it short, no more than two to three minutes.



Use a checklist as a prompt to ensure covering the essentials.

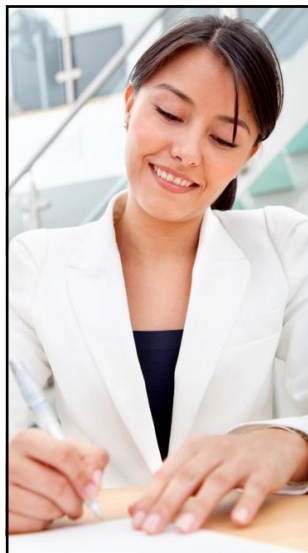


Focus on the student.



Provide positive frames using words such as efficiency, productivity, flexibility, collaborative, and successful.

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Preliminaries DOCUMENTS



- The participants should be informed, when applicable, that they will be, or have been (if sent via DocuSign), asked to sign a Mediation Participation Form so that everyone starts out with a common understanding of what to expect.
- Other paperwork procedures, when applicable

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Neutrality/Impartiality



- An essential principle to explain.
- Participants may not understand what it means to be neutral and may assume that you will take their side once you hear their story.
- Helping them understand neutrality and impartiality accurately may require repeated reinforcement.

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Voluntariness/Self-Determination



- Participants may assume a mediator has the authority to determine the outcome of their dispute.
- A mediator should inform participants that they cannot give legal advice or make decisions for them.
- A mediator can also inform the participants that their participation in creating a solution makes it more likely that the solution will be effective, since they know the student best and are therefore most capable of constructing an effective path for them.



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Additional Content for Virtual Sessions



- Virtual mediations bring added considerations that should be mentioned.
- Mediators should prepare participants for the possibility of technology issues, Zoom fatigue, privacy issues and noise/muting issues.



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Obtaining signatures on the MEDIATION PARTICIPATION FORM



Following their opening, a mediator should ask about any paperwork requirement.

If a participant wishes to make changes to MEDIATION PARTICIPATION FORM they may only be considered if all participants agree.

The three core principles of mediation (confidentiality, neutrality, voluntariness/self-determination) cannot be altered.

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Meeting Guidelines



- Review with participants meeting guidelines to promote efficiency — e.g., avoiding interruptions and name calling, handling side bar conversations and/or distractions.
- Ask participants if they would like to agree on any other guidelines.
- These guidelines may be different in a virtual setting.
- Try to get a verbal commitment to any agreed upon guidelines.




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Confidentiality

- Federal law provides that discussions occurring during a special education mediation are confidential and may not be used as evidence in a subsequent due process hearing or civil proceeding.
- The intent of this principle is to encourage participants to be open and honest, without fear of their words being used against them in a future proceeding.
- A mediator may mention that there are some small exceptions to confidentiality, such as harm to a child.
- If a mandatory reporter (e.g., licensed teacher, social worker, medical professional), a mediator should inform the participants of their heightened duty to report.

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Opening preliminaries

Cover participant introductions and ask how they wish to be addressed (e.g., their first, last name, title).

Ask if they are familiar with mediation.

Indicate if you have any previous contact(s) with any participants and explain the context.

Pin down time expectations.

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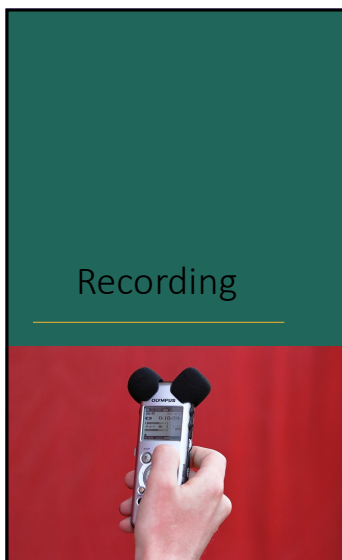


Setting the Table Your introduction



- Inform the participants that you are going to briefly review the primary purpose and process of their meeting and explain your role in it.
- Let them know that your services are at no cost, as an IDEA funded initiative.
- Introduce yourself and your relevant experience and very briefly demonstrate basic knowledge of the issues to be discussed.

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Recording



- If a participant seeks to record the mediation, explain why it is generally not permitted and reinforce the importance of confidentiality to the process.
- You should ask the participant seeking to record the mediation the reason they are seeking to record the process, to determine whether they are doing so due to a disability.
- If it is due to a disability, you should explore whether there are other reasonable accommodations available to the participant.

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Summary of Building Trust and Effective Opening Statements



- Trust is perhaps the most important component in a mediation.
- There are four essential building blocks to establishing trust, and an effective but brief opening is critical
- A mediator should utilize a checklist of preliminary issues and topics for their opening, including explaining their role in the process.
- The three core mediation principles to cover in an opening are neutrality, voluntariness/self-determination and confidentiality.
- At the end of their opening, a mediator should ask the participants to complete the LOCAL DOCUMENTATION, if any.

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PART 2 Topics

Unique Challenges
in Special
Education
Mediations

Agenda Setting

Reflecting,
Reframing


Asking Effective
Questions

Interventions,
Caucusing

Breaking Impasse



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Unique Challenge Making an Early Impression

- Participants may be skeptical of an “outsider’s” knowledge in an area that is so complex and technical.
- The window to convince participants that you understand their issues and can direct an effective process may be short.
- This requires making an immediate positive impression with your opening and framing of the issues.

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Unique Challenge

Threading the Needle

- The most significant challenge to building trust in Special Education sessions is the often-overwhelming power imbalance existing between a parent(s) and school/district staff.
- This inherent imbalance often accelerates already difficult dynamics, emotions, and expectations.
- Parents often expect you to intervene aggressively against school participants to “level the playing field” and ensure that they are not “run over.”
- School/district participants often expect you to intervene against the parent and/or advocate and to make the meeting shorter and less confrontational.

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Power Imbalances in Special Education

Reward Power

Coercive Power

Legitimate Power

Referent Power

Expert Power

Information Power



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Unique Challenge

Dealing With Time Expectations



Another unique challenge often present in Special Education disputes is dealing with time expectations.

Sessions often present especially unique challenges due to the combination of very busy participants and the layers of complexity and depth of the disagreements.

This requires a mediator to be especially strategic and efficient, always conscious of the time expectations and reading the participants' frustrations.



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Proactively Navigating The Challenges



Mediators should continually acknowledge the need to be efficient and productive, as well as the importance of making the process work for the student, so that the participants will not view it as a “waste of time” if things don’t resolve quickly.

You may want to strategically focus the participant’s traditional opening statement by efficiently summarizing the primary issues from intake.

Speaking privately with the participants in advance or in an early caucus may be very useful, as long as you explain your process clearly. Participants often assume that you are “reality testing” the other participant while in caucus!

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AGENDA SETTING

- GOAL
 - Uses name of student
 - Future focused
 - Collaborative language
- SUMMARIZE INTAKE INFORMATION
- SHARE/CREATE PROPOSED TOPICS
 - Ratify with family & school
- PRIORITIZE



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The importance of reflecting, reframing and asking effective questions



- Three of the most underrated skills in mediation are the ability to effectively reflect-back, reframe, and ask nonjudgmental questions.
- These three skills together constitute a critical tool to build trust, de-escalate, break an impasse, or write an effective agreement.

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The value of reflecting back



- Reflecting back what a participant says demonstrates that you are listening actively to their perspective.
- This builds their trust, as they see you are engaged and care about what they have to say.
- It also offers them the opportunity to reflect on and clarify their position.

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Positive reframes

Positive reframes include everyone being heard, being creative, being collaborative, building mutual trust, and being flexible.



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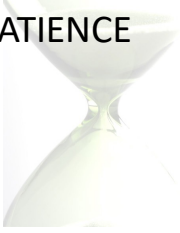
The value of reframing


- Turning a negative statement into a positive interest can change the direction of or refocus the conversation and lead to a realization that the differences in positions do not have to be personal.
- The technique is especially helpful if a negative assertion can be reframed to reflect a positive interest, and even more helpful if that interest is one that the participants share.
- The art of thinking differently.




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NAVIGATING TIME... WITH PATIENCE






The extent to which you reflect back maybe impacted by the time expectations of the participants.




A mediator must be cognizant of the fact that a school district employee or attorney may not understand the value of active listening.



This can be navigated by strategically employing caucusing, reflecting only the most important information, and efficiently reframing.

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Asking questions

When reflecting and reframing, it is important not to assume that the participant agrees with your interpretation of their words.

You should present a question that allows the participant to clarify/correct your interpretation.

You then should ask questions that clarify and moves them to consider how interests can be met.

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The importance of questions



- Once a session has begun, questions are often a mediator most utilized tool for success.
- Formulating effective questions take time and hard work, especially as a session wears on.
- They should be the default tool of choice through **every stage of the process**.
- Although formulating questions may take time and hard work (they don't come naturally), they often are **essential to moving participants towards resolution**.
- There are three primary types of questions.

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Three categories of questions



The three **primary categories of questions** that are the most effective are:

1. **Interrogatives – who, what, where, when, how and why questions.**
2. Questions that communicate **empathy and the desire to build bridges.**
3. **“Reality testing” or “reversing” questions.**

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Interrogatives



- The most frequent category of questions that should especially and almost exclusively be utilized both at the start of a session and at the end (agreement writing stage).
- They usually begin with Who, What, When, Where, or How...
- They should be asked in a manner and tone that demonstrates they are without judgment, aimed at *gaining understanding and insight*.
- They are open-ended, innocent, and encourage understanding.


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Uncovering interests



- A primary purpose in asking interrogatives is to uncover a participant's most important and underlying interests.
- Once uncovered, the session can better focus on meeting those interests.
- These interests are often hidden by the camouflage of a participant's position.

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Mutual interests

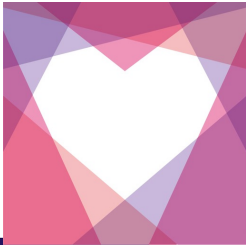
- In a special education case, the default mutual interest/question to repeat incessantly is, “What does the student need?”
- Another important mutual interest is the efficient use of time.

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Sample questions to uncover underlying interests


- *How might this make things better for Renee’s education?*
- *What makes this especially important to you and Jose?*
- *What problems do you think Beatrice might have if they do not choose the solution you are proposing?*
- *Could you please tell us how you reached that conclusion?*
- *What is your biggest concern for Martin’s education if things remain as they are?*
- *What important things would you like the others to know that might help them better understand how you feel about this?*
- *How do you think we could most effectively satisfy everyone’s interests?*

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Questioning to communicate empathy and the desire to build bridges.

- These questions are especially useful **in the middle and later stages** of the session.
- These questions don't judge a position but indicate a willingness to acquire an understanding to help resolve differences.
- These questions also demonstrate that the mediator is working hard to understand what it is that the participant cares most about.



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Examples of empathetic questions



"Let me understand ...",



"I think I understand what you are saying but help me fill in some details that I'm not sure about."



"I can see that you are very frustrated by their response. What would you say is the most important thing they could offer to make this work out better for Sammie?"



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Reality testing/ *reversing questions*

- Aimed at assisting a participant to consider the practical impact of their position.
- Most effective **in the later stages of a mediation** once a high level of trust has been firmly established.
- It is essential to undertake the extra time to ask **nonjudgmental questions**.
- Aimed at assisting a participant better understand the perspective of others.
- They generally ask a participant if they are willing to step back and consider how their position or proposal is likely to be perceived by others, how the logistics might play out, or how a proposed outcome might benefit the student.




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Examples of reality testing questions

- *"Do you have a sense how soon, and what the hearing officer might decide based upon these facts?"*
- *"If they did decide in favor of _____, what impact might that outcome have upon Suzie's education compared to the outcome being currently discussed?"*
- *"What do you think of the reasons they have offered for not taking the steps you would like to see"*
- *"Can you offer some ideas that you think might help overcome any of the concerns they have raised"*
- *"How do you think Lauren will react to the changes they are proposing, as compared to what she is facing now?"*
- *"Although I understand that you are not in favor of the proposed solution they have offered, do you think their proposal has any advantages to build off of for Henry?"*



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Intervention Basics

- One of the primary challenges for a mediator or facilitator is to intervene at the right time to avoid escalation but doing so in a manner that participants will perceive as neutral.
- This is especially challenging due to the frequent disparity in the participants' expectations and emotions.


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Most Common Intervention Strategies

- Start out with a **positive reflection**, such as: "It sounds like you feel very strongly about Billy's education plan."
- **Identify the impact** of the problem: "When you both talk at the same time, it makes it difficult to follow."
- **Reframe** the statement in the form of a positive interest if possible: "I hear you saying that you are concerned about Billy building resilience so that he is equipped to face the challenges to come?"
- Try to get at the **interests** beneath their strong positions by asking a question(s), such as: "Can you help us understand why you feel this concern is especially important for Billy's education?"
- **Try to empower the participants** to move forward: "It sounds like there is some frustration over our not making progress resolving this issue. Is there anything that we haven't yet discussed that might help move us forward towards a solution?"

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Breaking Impasse Tips



- **Remain positive.** People often feed off other's emotions. Help them focus on what they have accomplished so far in the conversation, summarizing areas of agreement and affirm the value of continuing to explore options.
- **Summarize the discussion** and ask questions about the underlying facts to try to **identify the specific roadblocks.**
- **Acknowledge feelings of frustration.** You might say, —"Yes, I can see that you're frustrated and it sounds like you don't understand how John came to believe that?"
- Try **role-reversal:** ask each person to assume the other's role and indicate what they would do in their shoes.
- Ask their **best, worst, and most likely alternatives** to a negotiated agreement and ask them to describe what life will look like if they remain unresolved and to compare the future if they reach resolution.

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Caucus Considerations in Special Education Mediations

- The unique dynamics in Special Education mediations make deciding when or if to **caucus a complicated decision.**
- One important factor is the **time constraints** of the session. If it appears that time is very limited, any time spent in caucus needs to be especially **strategic and efficient.**
- Because of the general dynamics, caucusing first with the family is usually safest.

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Caucus Considerations



- The purpose of a caucus may change, depending upon the stage of the mediation and the level of trust built with the participants.
- It is less important to caucus with participants for the same amount of time in Special Education mediations, but you need to read the room to make sure.
- Be sure to explain confidentiality in the caucus.



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Benefits of a Caucus



- If a relationship is volatile, a caucus may allow the parties to **let off steam** without the risk of escalation.
- If a participant is reluctant to address a topic, a caucus might provide them privacy for you to explore further.
- Discussing confidential information privately may open the door to discussing the issue in a more strategic manner.
- A caucus can encourage a candid **exploration of interests** and provide **space** to consider everything that has been said.



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Caucus Concerns

- Separating the participants may contribute to mistrust and hamper empowering the participants to work together.
- Private attorneys sometimes prefer “shuttle diplomacy,” because it allows them to avoid dealing with the sometimes-unpleasant personal dynamics of conflict and allows them more control.



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Other Strategies for Breaking Impasse

- Suggest a **trial period** – a temporary agreement – and then an efficient follow up for a review of how it’s working.
 - **Offer a model** of something you’ve seen other parties in this situation do.
- Ask if they want a **break** so that people absorb the conversation, can seek guidance, and even come back for another session.



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Additional Intervention Strategies



PART 2



- Move the focus to positive goals, such as the importance of hearing every valuable voice and/or improving the student's success.
- Mention the meeting guidelines/ground rules
- Re-focus them on the particular topic/agenda item: "It sounds like we are discussing item 4. are we satisfied with item 3, or should we go back and finish it first?"

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Dealing With Lawyers and Advocates



- The presence of attorneys and advocates may mean that additional time must be spent to "mollify" their expectations.
- They sometimes like to parse and debate issues that don't appear central to a solution.
- You may need to work actively to **diplomatically maintain control of the process**, including considering going to caucus more quickly.
- You should pick your battles with attorneys and advocates very strategically and may want to find ways to give them some "victories."

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AGREEMENT WRITING



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Mediation Agreement Provisions in the IDEA Regulations



34 CFR § 300.506(b) provides:

- (6) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that—
 - (i) States 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; and
 - (ii) Is signed by both the parent and a representative of the agency who has the authority to bind such agency.
- (7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

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The primary challenges to writing an effective mediation agreement

- Negotiations can be exhausting and often take longer than expected.
- Participants often assume that reaching a verbal agreement means their work is done.
- Participants may not understand all the language, terminology, and the legal implications of signing the agreement.
- Composing the necessary specifics of an effective, enforceable agreement often involves consideration and negotiation of details not previously discussed.
- Once all the details and implications of an agreement are fully understood, participants sometimes change their mind about signing an agreement.




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The Role of the Mediator

- Does not dictate or determine the specific agreement terms.
- Acts as a “scribe” and may offer wording for the participants to consider.
- Their most important role is asking appropriate questions to help ensure that the agreement is clear, complete, and realistic.
- If parties appear unsure about their legal rights or obligations, the mediator may need to halt the mediation and suggest the parties first seek legal advice.
- If both sides are represented, the attorneys may seek to write up the agreement following the session. Encourage that it be done in the session.




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Five Key Questions to Ask to Ensure an Agreement is Enforceable:

- **Who will be responsible?** Clear indication of responsibilities for all agreed actions.
- **What will happen?** Clear, concise descriptions of each action.
- **When will it happen?** Specific start and end times and dates.
- **Where will it take place?** Precise locations.
- **How will it impact the student's IEP?** Consider if it will amend the student's current IEP, and when it may expire.

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Additional Drafting Considerations

- Avoid contingencies and conditions.
- Provide balance from each party's perspective.
- Use active voice sentences.
- When designating a school person, unless the term will be implemented immediately or a contingency is written in, individuals should be listed by role.
- Conversely, if designating a non-school person, such as a parent, include their proper name (e.g., not "dad").

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Summary of Creating Effective Mediation Agreements



- To be enforceable, a mediation agreement must be in writing and be concise, unambiguous, and complete.
- A mediator should effectively communicate their limited role in writing the agreement.
- A mediator's most important role is asking questions about the agreement to ensure its enforceability and durability.
- Five essential questions to ask are who, what, when, where, and how.
- To ensure full understanding, an agreement should be read out loud.

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The Importance of Reading The Agreement Out Loud



- The agreement may contain complex terminology or a process that requires explanation or clarification.
- Participants may be reluctant or embarrassed to admit an inability to read or understand an agreement.
- Each term of a drafted agreement should be separately read out loud and the mediator should ask if each participant understands **and agrees** before asking for signatures.

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Waiver of Claims



- School districts, especially if represented by counsel, may insist upon language indicating that parents have waived their right to pursue a complaint for any claims existing as of the date of the agreement.
- An agreement without specific waiver language likely doesn't bar a parent from filing or pursuing a FAPE related complaint; therefore, parents should be aware of the rights they are waiving.

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Is a Written Agreement Confidential?



- IDEA, regulations are silent.
- Rules regarding inspection of education records apply.
- Federal Educational Rights and Privacy Act applies.
- Parties can agree to limit disclosure.
- Parties can agree to release to the public.

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