RESOLVING COMMON FACILITATION AND MEDIATION DISPUTES

IDEA VETERAN SPECIAL EDUCATION MEDIATOR TRAINING
NEW YORK STATE EDUCATION DEPARTMENT

VIRTUAL PROGRAM

WEDNESDAY, SEPTEMBER 15, 2021
THURSDAY, SEPTEMBER 30, 2021 (REPEAT PROGRAM)

DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

The purpose of this session is to identify various disputes that commonly arise in special education subject to due process hearings, State complaints, and mediation and to facilitate a discussion on how they may be resolved if the parties agree to mediate the disputes. This outline offers various approaches by way of example to resolving these common disputes. Participants may have other suggestions based on their own experience and are encouraged to share their suggestions, as well as any other common disputes not covered in our discussion and how they might be resolved.

It has been our experience that parties in special education disputes, usually after having gone through hours of IEP and other meetings, crave new ideas to resolve their differences and welcome the mediator's ideas and suggestions, particularly when the mediator has IDEA experience. Though it is our practice to engage the parties in how a particular dispute might be resolved and to offer settlement options to the parties, whether and when to share ideas and suggestions with the parties is dependent on an individual mediator's judgment, approach and/or style.

1. *Dealing with Participants who are Difficult*. Regrettably, dealing with participants who are difficult is not uncommon in special education disputes.

   Possible Options. To address a situation where a participant engages in inappropriate behavior, a mediator would usually utilize those basic traditional intervention skills, e.g., first warning the participant and, then, if the behavior reoccurs, defining the situation, reassuring/calming the individual; identifying inappropriate behavior and establishing conditions for further participation; or acknowledging/validating feelings. It is not a

purpose of this training to review these strategies but rather offer an additional option.

Another option is for the mediator to contact the parties prior to the mediation. While mediators frown against contacting the parties prior to the mediation, there is merit to contacting the parties independently in advance, e.g., an introduction, building rapport and trust and explaining their (mediator's) role in the process.

The call, at a minimum, should serve to:

- introduce the mediator to each party,
- address any objections/questions raised about the mediator,
- explain the process and the mediator's role,
- answer or respond to any questions/concerns about the process, the mediator's role and other participants,
- ensure time projections for the mediation are mutual and whether any of the participants need to leave early, and,
- confirm the date, time and place for the mediation.

Should either party raise a concern during the discussion about a participant's past or anticipated behavior/conduct/attitude, seek to understand the concern and how it might be addressed, e.g., by having the mediator discuss it with the other party and/or intervening if the behaviors occur during the meeting.

2. *Direct Versus Consultant/Level of Services*. Many parents and most school district staff understand that providing the student (and staff) with consultant services in more integrated, functional setting, is far more appropriate and beneficial to the student than traditional direct pull-out services. However, some parents, notwithstanding, will continue to demand direct, pullout services, believing the school district is proposing consultant services solely to save money.

A similar type of problem can arise when a parent's preferred provider recommends a particular level of service that is inconsistent with the requirements of the IDEA. In making their recommendations, these providers may use a best interest of the student standard or seek to have the services continue indefinitely.

Possible Options. The mediator should first attempt to understand the basis for the parent's request. Often it will be based on advice received from a physician or a private service provider utilizing the clinical service delivery model. An attempt might be made to confer with the physician/private service provider to ascertain their understanding, if any, with regard to the option of utilizing a consultant model in the school setting, including how it would work and its potential greater benefits to

the student. This might be accomplished before or during the mediation session.

With regard to the issue of the appropriate level of services, efforts might be made to inquire as to whether the physician/private service provider understands the legal obligation/standard the school district must meet in providing related services under the IDEA versus the more general clinical standard which they utilize. In short, under the IDEA, related services must be provided as are "required to assist a child with a disability to benefit from special education." In other words, a school district's obligation is to provide a related service only when the student needs it for this purpose—and not others. Another way to phrase it might be that under the IDEA a related service is necessary to assist the student to benefit from special education when it is required to enable a student with a disability to meaningfully attend, function, and participate in school (without jeopardizing the student's health and safety) so as to provide the student with access to an appropriate education. For a student being educated in a general education classroom, pursuing educational goals in the general education curriculum, the related services required would be those necessary to assist the student in meaningfully participating in the classroom (as well as the playground or physical education activities), as well as getting to and from and around the school.

3. *Extended School Year (ESY) Services*. Under the IDEA, ESY services must be available to any student whose IEP team determines them necessary to provide FAPE. Further, ESY services cannot be limited to particular categories or by type, amount, or duration. 34 CFR § 300.106. The most common threshold requirement for ESY established by federal circuit case law and state educational agencies (SEA) is that during significant breaks in schooling a student suffers regression of a skill which cannot be recouped within a reasonable period.

   Possible Options. The first thing to help the parties clarify is whether the student's needs meet the threshold requirement. Frequently, the mistake is that there has been no assessment in this regard (with the IEP team just shooting from the hip), or the assessment is made overall when, in fact, it must be on a goal-by-goal basis. While data from an assessment before and after vacations is best, sometimes a trusted teacher who knows the child well may be able to advise the parties on the child's regression and recoupment history.

   Second, assuming the student's needs with regard to a particular goal(s) meet the threshold standard, the ESY need not automatically be more traditional school days. The ESY might be fashioned to include certain related services, camps, community recreation programs, other agency programs, and any other type of program/service that would appropriately address the student's needs.

4. *Discipline Situations*. Basically, the legal requirements are different for students with disabilities, i.e., if their behavior is related to their disability, their IEP and/or behavioral intervention plan (BIP) is changed rather than the student being disciplined. And, even if the behavior is not related to the disability, the student must, nonetheless, be provided with "interim alternative educational services" (IAES) somewhere, albeit maybe not in school.

Typically, mediation situations will be just before, or after, a manifestation determination review (MDR) meeting is held. The purpose for this meeting is to determine (and it is assumed for special education purposes that the student committed the alleged inappropriate conduct) whether or not the conduct is a manifestation of the student's disability. Two questions must be asked and answered: (1) Was the conduct "caused by, or had a direct and substantial relationship to, the child's disability?"; or, (2) Was the conduct "the direct result of the [school district's] failure to implement the IEP?" If both questions are answered no, then the student can be disciplined in the same manner and for the same duration as would apply to any other student without a disability in the school district. However, if the answer is yes to one of the two questions, then a functional behavioral assessment (FBA) must be conducted (or reviewed) and a BIP developed (or reviewed), and the IEP reviewed, with the student returning to the prior placement unless the parent and the school district agree otherwise.

Possible Options. As a practical matter, typically the parent wants the student educated in school, while the school district, recognizing the student may need to be educated somewhere but not in the same school building, often wants the student educated in a different school/place than where the incident occurred. Therefore, the mediator might try to focus the discussion on: (1) identifying the IAES and how the student will be educated while the school district works on any necessary changes to the FBA, BIP, or IEP; (2) what needs to be done prior to the parties discussing/deciding where (and how) the student will be educated in the future (e.g., a manifestation determination, functional behavioral assessment or other assessment, BIP and/or IEP); and/or, (3) where (and how) the student will be educated in the future (if such can be addressed at the time of the mediation). If these can be resolved, arguments about MDR and other procedures often go away.

Too often school districts want to provide the educational services in the home. Practically, for many families, there is no one home during school hours and, therefore, any suggestion that the student remain in the home intensifies the dispute. More importantly, however, under the IDEA, a school district cannot only offer home instruction as the sole IAES option. If the sole IAES option is home instruction, the mediator can focus the

discussion on exploring with the parties other locations in the community (e.g., another school setting or a non-school setting), when practicable. And, parents can be reminded that a few hours of good individual tutoring may provide far better results than hours in a class with 30+ students.

A couple of other issues often arise in these situations. First, the parents may want documents relating to the incident and the findings of MDR team removed from the student's records because of their potential adverse effect on the perceptions of future school staff, colleges, and/or employers. If everything else can be worked out, often this can too, simply by the parties reaching agreement that the school district will seal the records subject to, however, the records being unsealed should there be additional incidents for which the records can be considered in the disciplinary proceedings relating to the new incidents or, if the parent sues the school district, during any administrative or civil proceedings for which the records are relevant. Second, most school districts have conditions which a student must meet before being allowed to re-enroll after a long suspension or expulsion (e.g., drug treatment, counseling, behavior contract, etc.). If so, the mediator should work with the parties to identify these conditions and clearly spell out in the mediation agreement what needs to happen for the condition to be met.

5. *Eligibility for Special Education*. Though parents seek special education, they primarily want their child's needs met—whether it's through special education or anything else (e.g., Section 504 Plan). Often, however, the parent wants the student determined IDEA eligible because of the perceived/actual guarantees an IEP offers.

   Possible Options. The mediator should try to have the parties focus on identifying the needs of the student. If there is agreement on the needs, the mediator should explore with the parties whether said needs can be addressed in general education with accommodations, maybe with a written "plan" and some enforcement mechanism. If not, maybe the needs can be met under Section 504 through a services/accommodations plan, with some variation to the plan typically drafted by the school district to accommodate inclusion of specific items that address the parent's push for an IEP (e.g., the inclusion of annual goals). If neither option is viable, then special education eligibility needs to be addressed.

   If a dispute regarding the child's needs/eligibility exists, the mediator should suggest a mutually agreed upon third party evaluating the student (with the school district giving up its right to evaluate the student itself and the parent his/her right to an independent educational evaluation (IEE)).

   Often, a complicating factor is the different jargon used in special education versus in clinical settings. We label eligibility categories per the

special education rules, while in clinical settings, clinicians speak in terms of, for example, disorders under DSM-5 (e.g., ADHD, dyslexia, bipolar, oppositional/defiant disorder (ODD), etc.). The label is really not important under the IDEA beyond the initial eligibility determination, for, once the student is determined eligible, the school district is required to address all of the student's needs whether or not related to the educational disability category (e.g., addressing behavior despite the student being determined eligible under the educational disability category of learning disabled). This said, whether because the parent perceives, incorrectly, that the student requires a particular label to obtain specific services /program or, in fact, the student requires a specific label to access a particular service/program (because, for example, of state requirements), obtaining an understanding of what is motivating the parent will help the mediator determine how to tackle the issue with the parties.

If general education services/accommodations address the student's needs but the parent is not willing to reach agreement with the school district because of lack of trust and the absence of the IDEA protections, the mediator should explore with the parties addressing any potential violation through a mutually agreed upon enforcement mechanism written into the agreement (e.g., appointment of district staff person to get agreement back on track or appointment of outside third party to investigate and decide any such dispute).

6. *Program Versus One-on-One Aide*. Often a parent will demand a one-on-one aide to assure the student gets his/her needs met, be they instructional, medical, behavioral, etc. The school district on the other hand may press for a program aide (i.e., an aide that is assigned to a classroom to address the needs of all the students within it and not to a particular child). Cost may be a factor in the school district's decision to go with a program aide over a one-on-one aide but not always.

   Possible Options. The mediator should first try to have the parties identify and agree upon the needs of the student that an aide would address. If agreement can be obtained on this, a discussion should follow on whether a specific need can be addressed by some other properly trained individual (even if on a one-on-one basis for a defined period of the school day), the classroom aide, or by some other means. If so, the mediator should pivot the discussion to whether the IEP specifically identifies the needs and provides for *detailed* goals/services to address the needs. This review, and corresponding revision(s), if necessary, may help the parent accept something other than a one-on-one aide because the student's needs would be "covered" during times of need and the IEP identifies who is responsible to address the various needs. If, however, the discussion on the student's needs makes clear that the student requires a one-on-one aide, said discussion may prompt the school district to reconsider its position, making an agreement more likely.

7. *ADHD Students*. ADHD students usually fall within the learning disability (LD) or other health impaired (OHI) categories, if IDEA eligible at all, and sometimes present a combination of academic and behavioral needs that require a detailed IEP and sometimes a BIP. Whether the student should be medicated can also arise, but a school district cannot require that a student be medicated as a condition of enrollment or the provision of special education services.

   Possible Options. Often, the dispute for students with ADHD centers around the failure to implement accommodations that are perceived not to be necessary or the failure to coordinate between the school and home (e.g., notifying the parent of required homework/assignments and their deadline). If the first, the mediator may want to explore with the parties agreeing to the school district reviewing the IEP accommodations with school staff responsible for implementation and providing informal in-service, preferably by a third party. Any compensatory education should also be explored to address any agreed upon failure to implement. If the second, the parties may consider appointing a "case manager" to coordinate between the school and home. The case manager may also serve to ensure compliance with implementation of accommodations and as the parent's first point of contact should a problem arise. Preferably, the case manager should be mutually agreed upon by the parties and should be someone in whom the parent has confidence.

   Technology may also be considered (e.g., Google Docs/Calendar) to allow the parent to obtain real-time information as it is entered by classroom teachers and other personnel and to respond in-kind. This has the added benefit of eliminating having the student, who may have difficulty with organization, shuttle a paper planner back and forth from school and home.

8. *Compensatory Education*. If a student has been denied a FAPE (and as a result suffered educational harm or deprivation), a common corrective action sought by parents is compensatory education, i.e., programs/services to try to make up to the student educationally what they wrongfully lost (e.g., missed sessions of related services, tutorial assistance after school or during the summer, etc.).

   Possible Options. The key here is often reaching agreement on what FAPE was denied the student and getting the parent to identify what compensatory education s/he is seeking and, if by an outside provider, at what cost. Identifying the estimated/precise cost can help the school district with getting on board with a settlement agreement; the relatively high cost of litigating a compensatory education claim may far outweigh the parent's request.

Addressing who provides the compensatory education services and when is also fraught with perils. Most school districts can accommodate reasonable amounts of compensatory education services through their own personnel (e.g., making-up a few missed related services). However, when the amount compensatory education services due is significant, addressing the logistics internally is difficult and, perhaps, even impracticable. If the school district is amenable to allowing outside providers to provide the compensatory education, the parties have two options to consider. The first option would require the parties to identify, and agree upon, "the what, by whom, cost caps, and by when." Here, the school district would either reimburse the providers directly or the parent upon submission of proof of payment. The second option is a variation of the first, but, instead, the parent and the school district agree to general parameters, with the parent (perhaps with some assistance from the school district) taking the lead in filling in the details. The school district would establish a compensatory education account from which payments would be made as services are rendered.

9. *Methodologies*. Generally, the school district has discretion to determine what instructional methodologies will be used with a student with a disability, provided the chosen methodology provides the student FAPE. IDEA does not require that a student's IEP identify a specific instructional methodology. However, there may be circumstances in which a particular teaching methodology is integral to what is individualized about a student's education and, therefore, should be incorporated into the student's IEP. Disputes about methodology are common.

   Possible Options. When addressing a methodology dispute, the mediator should refocus the discussion on approaches/ techniques/strategies to meet the individual needs of the student rather than on a "branded" methodology, which can be a package/variation of such approaches/techniques/strategies. These approaches/ techniques/strategies might then be placed on the student's IEP, provided they are an "integral part" of what is individualized about the student's education.

10. *Parent Needs*. Sometimes there is a parent (like most of us) who may not see that s/he needs help and the school district, for a variety of reasons, may not want to suggest the need for the help. Examples are where a parent is in denial with regard to student's disability, fails to understand the implications of the disability, or is simply ill-prepared to address the needs of the student.

    Possible Options. Under IDEA, related services include "parent counseling and training" and "social work services in schools" to assist parents to work in partnership with school districts, as well as help parents understand/accept their student's disabilities and their implications. Such

might be suggested to be provided by either the school or, usually more acceptable to the parent, a non-school provider agreeable with the parent at the school district's cost. Reminding the school district that a relatively small investment now to potentially improve the parent-school district relationship could lead to significant savings in staff time and other costs is also a good idea.

11. *Behaviors Manifesting in the Home and School*. It is often apparent that a student's behavioral difficulties manifest themselves in both the school and home. Yet, often, behavior plans only address maladaptive behaviors occurring in the school setting, resulting in the same maladaptive behaviors being witnessed in school not being address in the home or, if addressed, the parent taking a different approach than what is in the plan to address the behaviors.

   Possible Options. The mediator should seek to reach agreement on taking a consistent approach to the student's inappropriate behaviors, both at school and at home, as appropriate and necessary. (If an outside agency is involved in the home, consideration should be given to asking the parties whether the case worker should be invited to the mediation.) If the parties agree to taking a consistent approach, the discussion should focus on drafting a BIP that would be implemented in the school, home, and other settings, with further consideration given to whether the IEP also requires amending (e.g., amending the IEP to include "parent counseling and training" to provide training to the parent on how to implement the BIP outside the school).

12. *"They Just Don't Do It*." Often, parents allege that school district staff do not follow their child's IEP (e.g., general education teachers do not implement accommodations included in the IEP or the bus driver does not know about the child's BIP).

   Possible Options. The IDEA requires that each teacher and provider be "informed" of their "specific responsibilities" and any "specific accommodations/modifications/supports" the teacher or provider is required to implement. 34 CFR § 300.323(d)(2). Too often, however, teachers (and, particularly, general education teachers) and providers are not aware of their IEP responsibilities. Should the parties agree that there have been shortcomings in the implementation of the student's IEP, the parties may consider outlining for each teacher/provider their specific responsibilities using a form like "IEP at a Glance," attached.

13. *Form Versus Substance*. Sometimes parents will allege that a school district violated particular provisions of the IDEA or state law. Such may be a "technical" violation, but the IDEA requires hearing officers and courts to inquire whether the violation significantly impeded the parent's opportunity to participate in the decision-making process regarding the

provision of FAPE to the student, impeded the student's right to FAPE, or caused deprivation of educational benefit to the student. Bottom line, the question is, "Was there any substantive harm to the student/parent?"

➢ ***Possible Options.*** If the discussion amongst the parties suggests that there was no substantive harm to the student, but the parent is understandably frustrated, an acknowledgement/admission or even an apology might be given with an assurance to do it right moving forward. Or, a written acknowledgement of the violation might be included in a mediation agreement, together with recognition that, on this occasion, it had no adverse effect. (An apology or admission, combined with a commitment to make it right, in almost any circumstances can significantly improve the parent-school district relationship, both in resolving other disputed issues during the mediation and long-term.)

14. *Academically Okay Does Not Necessarily Mean No Disability*. Too often, school districts take the position that if a student is academically successful, s/he is not eligible even though s/he may have serious emotional/social needs. Reliance is sometimes placed upon the language in the definition of "a child with a disability" to the effect that the student must "need special education and related services."

➢ ***Possible Options.*** IDEA specifically addresses this point in a variety of ways. However, if the discussions between the parties skirts any meaningful discussions regarding the IDEA provisions or case law on point, depending on the mediator's approach, s/he may seek to have the parties address same with each other. Alternatively, exploring with the parties agreeing to a third party with appropriate expertise to address the eligibility issue may help the parties obtain necessary information to make an informed decision regarding eligibility.

15. *Parents' Assertion of Privilege/Privacy Rights*. Some parents when seeking evaluations and demanding services fail to offer or refuse to provide the records of, and/or access to, non-school district professionals who have evaluated/treated the student regarding educationally relevant matters (e.g., counseling, therapy, prescribed drugs, tutoring, some type of evaluation, etc.).

➢ ***Possible Options.*** Clearly, school districts have no right to non-educationally relevant information. But, by demanding services, the parent, eventually, at any hearing under IDEA, will likely be held to have waived any privilege concerning such information/records. *See I.D. v Westmoreland*, 17 IDELR 417 (D. N.H. 1991); *I.D. v Westmoreland*, 17 IDELR 684 (D. N.H. 1991). The parent's continuing refusal in the hearing process to surrender such information/records, if directed by the hearing officer, could result in dismissal of an issue relating to the information/records at the discretion of the hearing officer. Focusing the

discussion on how the issue may play out in the hearing context may help the parent to reconsider the matter. Also, given that the school district is not entitled to all information, a discussion on whether redacting the document(s) (if necessary, by a mutually agreed upon third party) may address the parent's concerns. If there is a lack of general trust between the parent and the school district, the parties may also consider having staff talk to the private professional with the parent present or, if the parent trusts one particular staff member, having only that staff member speak to the private professional.

16. *Visitations*. Districts sometimes prohibit, or severely restrict, the opportunity of the parent, their advocate, or their expert from observing the student in school. The reasons may vary but often are that it is an undue disruption to the educational process or, if a hearing is pending, that it is in effect "discovery."

   Possible Options. The first thing to explore with the parties is whether the school district has a district-wide or building visitation policy in writing or in practice and whether it has been followed. Second, regardless of the provisions of that policy, if any, parents under IDEA have been deemed to have a right to observe the student in order to be able to effectively utilize their other IDEA rights, most notably an IEE, file a complaint, or exercise their hearing rights (particularly with regard to obtaining a basis for expert testimony). Extended visitations for the purpose of monitoring/supervising/training staff have not been upheld. Thus, what is observed, the length of the observation, and the conditions under which it is done come down to striking a balance between providing the parents a reasonable basis to exercise their IDEA rights without causing undue educational disruption. *See*, *e.g.*, *Washoe County Sch. Dist.*, 106 LRP 11741 (SEA 2005).

17. *Assignment of Staff*. Disputes arise where parents for a variety of reasons object to the staff person assigned to implement an aspect of their child's IEP. If it is the teacher, it usually involves qualifications.

   Possible Options. If the credentials of the teacher are not in dispute but the question remains as to whether the teacher has the skills/training to implement the IEP (e.g., it provides for a particular methodology in which the teacher has not been trained), the mediator can assist the parties by refocusing the discussion on whether [additional] supplemental aids and services are necessary in the IEP. And, if so, the parties should then turn their attention to how the IEP will be revised and by when. Additionally, depending on the specific training, consideration may be given to whether the parent should be present for the training, particularly where the training, for example, involves medical interventions for which the parent is experienced.

18. *Trial Placements*. Too often parents and school districts get into a dispute about whether a particular placement or class is appropriate, usually in the least restrictive environment (LRE) context. A battle of experts looms on the horizon.

   Possible Options. A trial placement – with agreed upon goals, criteria for measuring the progress on those goals, and agreement that the stay put would not be the trial placement – may jumpstart settlement discussions. Sometimes, a mutually agreed upon third party can review the situation and suggest the trial placement which should first be tried, with any disputes concerning its success or possible adjustments being sent back to the third party as the trial placement proceeds.

19. *Parent Wants to Withdraw Student from Special Education*. The IDEA expressly allows the parent to withdraw his/her child from special education despite the likelihood that such decision is more often not in the student's interest. While a school district cannot go to hearing to override the parent's decision or even press for mediation, sometimes a parent or their advocate/attorney may seek an IEP meeting or mediation because the decision to withdraw is premised on the parent being discontent with something that is happening in the student's program.

   Possible Options. First, attempt to clarify whether the parent's concerns are premised on a genuine belief that the student does not require services or simply because the parent is unhappy with what is being provided to the student. Depending on how this discussion proceeds, the mediator can refocus the discussion on the merits of a reevaluation (to assess continued eligibility) or the perceived deficiencies with the IEP and program. If the issue is continued eligibility, and the parties are in an impasse, some school districts would consider providing services under Section 504 or general education with supports, depending upon the student's needs, because the alternative, i.e., nothing, can be worse for the student, fellow classmates, and the classroom teacher. Exploring this option with the parties, when appropriate, may pave the way to an agreement.

   Another consideration is to attempt to have some mutually agreed upon third person counsel the student, the parents, or both, with regard to the impending crisis that may befall the student should the parent withdraw consent for services. This individual may also meet with school district personnel to address any shortcomings identified by the parent and/or student. A parent of a student with similar disabilities who is now in an advocacy or a professional role may provide the best likelihood of success with this approach.

20. *Accommodations "As Needed."* Some parents contend that accommodations provided on an "as needed" basis in an IEP is worth next to nothing. Depending upon the situation, they may well be right.

   Possible Options. An attempt should first be made to identify who will be making the determination as to when the accommodation is "needed." This may include the student him/herself. Second, the mediator should attempt to establish the factors or criteria upon which that person(s) will be making the determination and incorporate same into an agreement. Oftentimes, these factors can be written into the IEP in place of the "as needed" language.

21. *Real Bad Parent/School or District Relationship*. An underpinning of the IDEA is that a parent and school district work in partnership to educate the student. But the "marriage" is forced because the parent happens to reside in the school district. Rarely will a party raise a bad relationship/breakdown in trust as an issue to be mediated. It will manifest itself potentially in a variety of ways (e.g., outright hostility, general lack of cooperation/game playing, widely divergent views as to the capabilities/needs of the student, parental attempt to micromanage the development of the IEP and its implementation/school district being unwilling to make commitments in IEP/BIP, etc.).

   Possible Options. In larger local school districts with multiple schools serving the same grades, the fix is easier, provided the school district is willing to authorize a transfer, preferably with transportation, when needed. Where that's not possible, short of the parent moving to another school district, consideration for a private placement with the school district responsible for partial/full payment, may be considered.

   If the parent and the district are willing to continue to try to work together, the concept of a mutually agreed upon third party might be suggested. The third party could informally review the situation and make recommendations or determinations regarding the student's capabilities (or possible progress) and appropriate programs/services/behavioral interventions. Or, the third party could investigate and determine disputes.

22. *Reimbursements*. Parents will seek reimbursement for attorneys' fees, related costs, evaluations they have obtained privately, services they may have obtained privately, etc.

   Possible Options. School districts may as a matter of principle strongly object to paying attorneys' fees or private evaluations/services, particularly where they fear that other parents may follow suit. Taking reimbursement items in piece meal may be less effective in reaching agreement than lumping all reimbursement claims together and

negotiating one lump sum. It makes paying anything that the school district does not want out in the public as having paid easier and avoids negotiating the amount for each separate item for which reimbursement is sought.

23. *District Worries About Future Stay-put*. Sometimes a school district is unwilling to make changes to a student's IEP (even on a "trial" basis) because any change to the IEP constitutes the student's "stay put" if the IEP is challenged in a hearing. (Absent agreement to the contrary, services offered through a mediation agreement may be considered part of a student's stay-put should there be a subsequent dispute in which the parent files for due process.)

   Possible Options. Under IDEA, a student's stay-put can be modified by agreement of the parties, even prospectively. Accordingly, if the school district's hesitation to agreeing on changes to the student's current IEP would considered to be part of his/her stay-put should there be a subsequent due process hearing request, the parties may include in the mediation agreement that changes made to the IEP as a result of the mediation agreement would not be deemed a part of the student's stay-put should the parent file a due process complaint.

24. *Private School Placement*. Parents will request a private placement at school district expense typically under two related circumstances. First, where there is disagreement on the IEP. Second, when they believe a school district cannot logistically provide an appropriate program for their child based on the school district's perceived poor history with the student in attempting to do so.

   Possible Options. Initially, when the disagreement in based on the IEP, reaching agreement on the components of the IEP in dispute is paramount, perhaps with a primary focus, when appropriate, on the program/service components necessary to address the student's needs, (e.g., the type of special education classes, the type of related services and the LRE considerations regarding participation in general education classes and other activities). Without the parties being on the same page on needs and how to address the needs, reaching agreement on a placement is practically impossible. If the parties cannot agree on the student's needs, consideration should be given to the steps suggested in subparagraph 4, *supra*.

   If, however, the disagreement has to do with a poor history of not addressing the student's appropriately identified needs, consideration should be given to appointing a third party neutral to assess whether the student has made progress commensurate with his/her abilities and unique needs, with the third party neutral making recommendations on

compensatory education, inclusive of private school placement, if s/he determines that there has been a lack of commensurate progress.

25. No/Partial Agreement. Mediations are not always successful. But, even if the parties are headed to a hearing, the mediator can help.

Possible Options. Identifying the issues for hearing with precision is one of the most difficult tasks a hearing officer undertakes. If the mediation is not successful, but the mediator, as a result of his/her managing the mediation process, has identified with specificity the issues that remain unresolved, obtaining the parties written agreement as to those issues to be submitted to the hearing officer will be very beneficial to the parties in pursuing the hearing process, as well as the hearing officer in handling the hearing process. (Any agreement, however, should not divest the hearing officer of his/her authority to independently revisit the issues with the parties.)

26. *One-on-one Nurse*. Some children with disabilities require intensive medical interventions while in school. Under the IDEA, such interventions must be provided by the school district if they are required during the school day. Due possibly to a lack of confidence in non-medical, school staff to be able to perform medical functions or just from an abundance of caution, parents may seek the provision of a full-time nurse for their child on the IEP.

Possible Options. When determining the need for a one-on-one nurse, identifying the specific medical intervention(s) the student needs must be agreed upon, including the procedure, response time required, and training of the provider. If the parent has not already obtained from the student's physician a written protocol for the procedure, the mediator might suggest to the parent during the pre-mediation call that s/he do so.

Gently inquiring of the parent who performs the medical intervention when the student is not at school and the individual's training, may provide an opening to consider other options, where, for example, the parent/guardian/relative/baby-sitter does it him/herself and are not medically trained. Also, inviting the parent to the training of staff to provide the nuances of assisting their child may relieve the parent's concerns.

Sometimes union contractual provisions will impact which staff can provide the intervention(s), which is okay as long as the student's needs are being met appropriately.

27. *Parent Objects to District's Restrictions on Communications*. When parents engage in voluminous, profane, or otherwise inappropriate correspondence/meetings with staff, many school districts will impose

restrictions, including establishing communication protocols or guidelines. Parents may object that the restrictions are retaliatory, unreasonably restrict their ability to communicate with staff, or violate their rights under IDEA to meaningfully participate in their child's educational programing.

Possible Options. Assuming there is a possible basis for some restrictions, the Office of Civil Rights (OCR) and courts have upheld various limitations on parental contacts with school district staff, including the purpose, content, and who can be contacted and at what frequency/timing. This said, any restrictions, if warranted, must be reasonable. A starting point for the mediator is to have the parties explore whether there is a legitimate basis other than the parent's advocacy, the reasonableness of the basis, the scope of the restrictions given the basis, and the negative impact, if any, on the parent's right to be involved in communicating with the staff serving their child (e.g., regarding problems and progress) and in planning their child's program. Based on that discussion, the mediator can assist the parties in modifying the communication protocol, as appropriate and agreed upon, including exploring with the parties designating a point of contact for the parent, preferably a person the parent trusts.

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH GENERAL TIPS AND STRATEGIES TO ASSIST SPECIAL EDUCATION MEDIATORS REACH AGREEMENT WITH THE PARTIES. IN USING THIS OUTLINE, THE PRESENTER IS NOT RENDERING LEGAL ADVICE TO THE PARTICIPANTS.