BASIC MEDIATION PROCEDURES

IDEA SPECIAL EDUCATION MEDIATOR TRAINING
NEW YORK STATE EDUCATION DEPARTMENT

SEPTEMBER 6, 2023 – SEPTEMBER 7, 2023
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I. INTRODUCTION

Experience has taught us that the parties in special education mediations welcome a more directive approach to mediating their disputes. This is not to say that the use of a facilitative, transformative, or evaluative approach is not met with success. However, unlike most other situations involving mediation, in the special education context, the parties, with rare exception, have participated in multiple IEP team and/or other meetings for hours discussing the disputed issues and are now wanting a "get at it" approach that would spare them from the more adversarial (and costly) alternative of due process.

The IDEA mediator, therefore, depending on the mediator's training and own comfort, should be prepared to invoke overlapping approaches, as circumstances warrant, based on his/her assessment of the dispute and the tolerance of the parties. This may include assuming the role of a "deal-maker."

This outline discusses various aspects of the mediation process and offers some strategies to consider in mediating special education disputes. These strategies have resulted in a higher likelihood of success than traditional approaches.

II. PRE-MEDIATION DISCUSSION CONSIDERATIONS

A. Initial Contact. Some mediators frown against contacting the parties prior to the mediation session itself. Others, including those who take a facilitative approach, may try to contact the parties but limit their discussions, for example, to an introduction, building rapport and trust, and defining how the mediation will be structured. Few would directly engage the parties in a substantive discussion of the dispute.

There is merit to contacting the parties *independently* in advance of the mediation session. The extent of the discussion will largely depend on the

mediator's approach. But, at a minimum, the pre-mediation discussion should explain the process, answer or respond to any questions/concerns the party might have about the process, confirm participants, including that the school district will have someone present with decision-making authority, and establish (or confirm) the date and time for the mediation session. The mediator should also assess and address any potential logistical problems that come to his/her attention during the discussion. These might include, for example, issues as to where the mediation session will be held (either because the parent is reluctant to meet in the school district's central offices or a participant requires an accessible location), the length of the session (either because the parent's work schedule / childcare needs require accommodating or school district participants includes classroom teachers or other personnel that provide direct services to children and their prolonged absence would create a hardship for the school district), the desire to record the mediation session (because, depending on school district policy, it is permissible practice in IEP meetings and the parent believes it equally applies to mediation sessions), and who should/should not attend the mediation session (either because there is a security concern or strained relationships between expected participants the presence of which may result in a party bowing out of the mediation session).

Often, however, during these calls, the parties will share their viewpoints on the issues. Whether the mediator opts to be a passive listener or takes a more affirmative approach to understanding the underlying dispute is, as we said, largely dependent on the mediator's approach. Engaging in these discussions provides the mediator with an early opportunity to clarify the issue(s), explore common interests that may lead to agreement, and propose possible options for the parties to explore/consider in anticipation of the mediation session. It also affords the mediator time to think about the issue(s), do any research that may be necessary to fully understand the legal boundaries of the underlying dispute, and strategize on how to bridge the gap between the parties.

For these reasons, immediately after being appointed, we suggest that the mediator communicate in writing with each of the parties to schedule a time to talk. Typically, we suggest that the mediator first speaks with the parent for two primary reasons: (1) the parent is typically the party who raised the issue(s) in dispute; and (2) the parent may otherwise eye the mediator suspiciously if s/he learns that the mediator first talked to school district personnel.

The written communication to each of the parties should identify the topics for discussion. This written communication may be sent via email, if that is an option. It should include[1] –

[1] This list should be modified, as appropriate, to align with local practices.

1. confirmation that the party has been advised of the mediator's appointment;

2. confirmation of the date, time, and location of the mediation, if directly scheduled by the Community Dispute Resolution Center (CDRC), or, if each mediator schedules his/her own mediation sessions, that the mediator intends to discuss the scheduling of the session;

3. the anticipated length of time each party should set aside for the mediation session, subject to revision after mediator has had an opportunity to speak with both parties;

4. that the mediator plans to speak with the parties separately prior to the session itself to address any questions or concerns regarding the process, gain general understanding of the matter, and address any potential logistical problems;

5. when the parties should expect to be called; and

6. the agenda items, including –

    a. whether the party has any concern regarding the mediator's appointment;

    b. the party's rights under IDEA and New York State law as a participant in the mediation;

    c. how the mediation may be conducted and whether the parties agree with the approach or have some suggestions of their own;

    d. a review of the [mediation request/due process complaint/state complaint] which gave rise to the mediation, with an opportunity for the mediator to ask clarifying questions;

    e. whether the party will be accompanied by an advocate or attorney to the mediation, or anyone else;

    f. whether the party will need access to a telephone for anyone who might be "on call" to provide information or advice (e.g., an attorney/advocate or spouse/partner);

    g. whether there is any information that the party believes the mediator should review prior to the mediation and why;

h. whether the party or anyone accompanying the party requires any special accommodations; and

i. other matters that the party would like to discuss.

B. Concerns About Mediator Serving. The likelihood that a party will have concerns or any objections to the appointment of a specific mediator is minimal. However, asking the parties whether there are any concerns or objections is important because it establishes the groundwork for trust in the mediator and affords the mediator an opportunity to address the concern(s)/objection(s), if any, prior to the mediation session.

C. Rights Related to Mediation. There are few but important rights in IDEA mediation: participation is voluntary; mediation cannot be used to delay or deny the right to a due process hearing or other rights under IDEA; if the dispute is resolved, the parties must execute a legally binding agreement signed by the parent and a district representative with authority to bind the school district, and includes language stating that discussions will remain confidential; and, the agreement is enforceable in a federal or State court of competent jurisdiction.

The meaning of confidentiality and what it applies to in the mediation context is different to what most parents understand the term to mean and explaining the term to the parent is critical. For example, most parents become familiar with the term in the context of education records. In this regard, a school district has an affirmative obligation to maintain the confidentiality of personally identifiable information of students. A student's parent would be privy to their child's personally identifiable information and can, unlike the school district, freely share it with others. Conversely, in mediation, the discussions must remain confidential (*see* 34 C.F.R. § 300.506(b)(7)) and both the parent and school district are not at liberty to share those discussions with a third-party, including in a subsequent due process hearing or court proceeding under the IDEA.[2]

As noted above, mediation cannot be used to "deny any other rights afforded" to the parent under the IDEA. *See* 34 C.F.R. § 300.506(b)(1)(ii). The meaning of this language is not apparent. At a minimum, it would mean that a parent may file a State complaint, engage in mediation, and, if mediation is not successful, have the complaint investigated within the

[2] Any documents or potential testimony that a witness could offer in a due process hearing or court proceeding independent of the mediation session (i.e., evidence that is otherwise admissible or subject to discovery outside of mediation) is not precluded from subsequently being used during a due process hearing or court proceeding simply because it was shared during a mediation session. Interpreting confidentiality in such absolute terms would dissuade parties from voluntarily agreeing to mediate.

applicable timeline.[3] *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46695 (August 14, 2006). However, would this language also preclude, for example, a school district from demanding the waiver of certain rights under the IDEA? A waiver of right is a common provision in a settlement agreement, including special education mediation agreements, particularly when attorneys are involved directly or indirectly.

D. How the Mediation will be Conducted. We do not suggest the traditional, uninterrupted opening statement. As noted above, by the time the parties are sitting at the mediation table, they have likely spent hours discussing the issue(s) and believe, whether accurate or not, that they have an understanding of the other party's position on the issue(s) and the basis for it. Listening, uninterrupted, to the other party yet again too often creates frustration and starts things off "on the wrong foot." So, we suggest that after introductions, the mediator address any required preliminary matters, review the rights of the parties, and lead a directed discussion to clarify the issue(s) in dispute in an attempt to ensure everyone has the same understanding. The mediator might allow the discussion to wander a bit so as to provide for the opportunity for a party to be heard on something it believes important but, generally, should keep the discussion focused on understanding the issue(s).

Upon confirming the issue(s) in dispute, whether to discuss the issue(s) in a joint session or in separate caucus varies with mediators but we would suggest greater flexibility than what is typically preferred by facilitative mediators (i.e., sparingly using caucuses). In part, because, as we have said, the parties have most likely exhausted their collaborative efforts in trying to resolve their disagreements and any further joint discussions may be received as more of the same, increasing the frustration.

Caucusing allows the mediator to take a more direct approach with a party with much less risk of being perceived by the other party as favoring one party over the other. How the mediation proceeds after caucusing is flexible depending on the situation.

Should the parties resolve their dispute, expectations should be set at the pre-mediation discussion that, absent extenuating circumstances, the written agreement will be drafted and signed on the spot. Doing so avoids

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[3] Mediation is not an exceptional circumstance that would justify extending the 60-day timeline for issuing a final decision in a State complaint, unless the parties agree otherwise. *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46695 (August 14, 2006). *Cf.* 8 NYCRR § 200.5(l)(2)(vi)(b) (permitting the parent and school district or other public agency involved in the State complaint to agree to extend the 60-day timeline to facilitate participation in special education mediation).

losing the agreement due to second thoughts or a party walking away from the agreement because the other party engaged in unnecessary wordsmithing or is now seeking to add additional terms.

The parties should also expect to have the mediator take the lead in drafting the agreement, *even when the parties are represented by attorneys*. This said, the mediator must take great care to ensure that the agreement's wording fully and accurately reflects the actual agreement of the parties and that the parties are engaged, to the extent willing, in the wordsmithing.

E. Review the Nature of the Dispute. If the mediation arises from a due process complaint, State complaint, or disputed IEP, the mediator should consider obtaining a copy of the complaint/IEP before the discussion. This can be requested in the written communication advising of the impending discussion. Having the complaint/IEP can be a great aid in identifying the issue(s) in dispute and will, most often where a disputed IEP is at issue, provide the mediator with a contextual understanding of the issue(s). These documents will also help the mediator ask preliminary, but informed, questions regarding the issue(s) and the parties' perception of the issue(s), as well as help to identify potential solutions, all of which can be very helpful going into the mediation session. And, to the extent potential solutions are identified by a party, it allows the mediator to explore the firmness of the ask/offer and willingness of the party to consider alternatives.

The complaint can also help identify necessary information that the party should bring to the mediation session. For example, if the parent is seeking reimbursement or a service/placement, knowing this ahead of the mediation session allows the mediator to ask the parent to bring with him/her, for example, evidence of payment for the amount they seek to be reimbursed or information about the preferred service/placement, if not known to the other party.

Since a major factor in delivering effective special education services to a student with a disability is the relationship between the student's parent and school district personnel, we suggest mediation be approached as a possible opportunity to address and resolve any other problems/issues which exist between the parties that were not necessarily the basis for the request for mediation. Therefore, regardless of whomever initiated the request for mediation, do not assume that other party does not have an issue(s) of its own to discuss. Any such issue(s) should also be discussed and, where possible, resolved.

In addition, sometimes non-special education issues (which would not be necessarily hearable) are raised (e.g., those involving records, grades, staff assignments, bus pick-up/drop-off times, sports participation, etc.). If the

parties are willing, and hopefully they will be, these types of issues can be discussed and resolved in mediation as well, to hopefully establish a clean slate from which the parties can move forward.

Relatedly, the mediator should also explore whether there are any additional proceedings pending or contemplated (e.g., due process hearing, State complaint, 504/ADA hearing/complaint/suit, or tort litigation). If so, the mediator may want to discuss with the parties whether the parties would like to include the issue(s) therein in the mediation and, if not, and an agreement is reached, whether same will be specifically excluded from the mediation agreement.

Note: New York has opted to disallow alleged violations of mediation agreements to be the subject of a State complaint (i.e., seeking enforcement). The mediation agreement is only enforceable in any State court of competent jurisdiction or in a federal district court.[4] *This said, the parties may opt to create their own enforcement mechanism for such claims in the mediation agreement, as discussed below.*

F. Presence of Advocate or Attorney. Even when a party is represented, all efforts should be made to speak directly with the party regarding the items in the written communication. Clearly, if the party is represented and that is known to the mediator, the mediator should include the attorney in the written communication. Some advocates/attorneys are unnecessarily protective of their clients and will want to speak on the client's behalf. If this happens, the client nonetheless should also be a participant in the initial telephone conference. At the outset, it may be helpful to remind the advocate/attorney of the importance of allowing the client to take a leading role in the process with care taken not to devalue the advocate/attorney's function. Reminding the advocate/attorney that the mediator will presume the discussion confidential unless permission is granted to share what has been learned with the other party may alleviate the advocate/attorney's concerns about allowing the client to speak directly with the mediator.

This approach may also be a basis for a path forward during the mediation session itself. In our experience, advocates and attorneys will relinquish their primary role during the mediation session if they have trust that the mediator will not seek to compromise their client's position, knows when

[4] *See Helping Parents and School Districts Become More Effective Partners, Special Education Mediation Questions and Answers Guidance*, updated September 27, 2016, https://www.nysed.gov/sites/default/files/programs/special-education/special-education-mediation-q-and-a.pdf. Accessed Aug. 24, 2023. However, if the mediation agreement resulted in a change to the student's IEP pursuant to 8 NYCRR § 200.5(h)(5), the parents could submit a written State complaint alleging the IEP is not being implemented. *Id.*

to defer to the advocate/attorney, and establishes a reciprocal set-up with the other party, if the other party is also represented.

Should a party be represented but the advocate/attorney is not expected to participate in the mediation session itself, the mediator should discuss with the party and/or advocate/attorney whether the advocate/attorney will make him/herself available to the party during the mediation session should questions come up or, should an agreement be reached, to review the terms of the agreement and, perhaps, the language itself. All efforts should be made to impress upon the advocate/attorney of the importance of having the agreement, if any, finalized during the session itself.

Should the mediation involve a parent of a student who is of the age of majority, it would be important for the mediator to establish whether the parent has guardianship of the student and, if not, who the attorney/advocate represents. It may be necessary for the mediator to independently verify with a student who is of the age of majority whether s/he has retained the attorney/advocate to represent his/her interests in the mediation.

The presence of an attorney begs the question whether the parent intends to seek reimbursement of attorneys' fees. This discussion should be had prior to the mediation. Presently, in New York State, attorneys' fees cannot be included in a mediated agreement, even if other issues were resolved through mediation.[5] This limitation is under review by the New York State Education Department. Until the review is completed, it would be appropriate for the mediator to advise the parent of this limitation. Any agreement on attorneys' fees would need to be in a separate agreement independent of a resulting mediation agreement.

G. Inviting Others. Mediators generally want the parties to have available at the mediation those persons who have relevant information, can assist in effectively communicating the party's views, and "decision-makers," which for the school district, is someone with the authority to bind the school district (per IDEA's requirement) and sign any agreement, and, as for the parents, as a practical matter, both parents. Alternatively, a school district may want a spouse present/on call as a perceived influence/decision-maker, or the student, typically when the discussion encompasses transition, behavioral issues with other students, or the student, if over 18 years old. (As appropriate, arrangements can always be agreed upon to have the student participate in only a part of the discussion.)

If a party, typically a school district, intends to have a large number of staff present, the mediator will need to assess whether to permit all staff members to remain in the room with the parties or have staff members in

[5] *Id.*

a separate room or "on call," participating in the session as needed. The relative imbalance between the two parties and the parent's perception of same is something to take into consideration in deciding whether to invite staff members to remain in the room.

On occasion, a parent may want to have a staff member / private evaluator participate in the mediation. When the request is made, the mediator should seek to understand from the parent the anticipated extent of the evaluator's involvement. This will help the mediator determine whether the individual's actual presence is needed at the session or whether the individual can simply participate by telephone. Whatever the case, arrangements should be made prior to the mediation to allow for such participation.

Similarly, where a parent wants to exclude specific school district personnel from the mediation session, the mediator should seek to understand from the parent why and inform the parent that the request will be discussed with the school district. Sometimes the relationship between the parent and a particular staff member is so strained that not having the person present may increase the chances of the parties reaching agreement.

H. Reviewing Documents Prior to the Mediation Session. There may be evaluations, reports, or other documents that may assist the mediator to better understand the issue(s). The mediator should not hesitate to discuss with each party whether his/her (the mediator's) review of such evaluations, reports, or other documents would be of assistance to the mediator and whether such information should be reviewed by him/her (the mediator) prior to the mediation session. The mediator should make clear to the party that his/her review of documents provided by the party is simply to help the mediator to gain understanding of the issue(s) and that they serve no other purpose like, for example, evidence, as mediation is not a due process hearing.

I. Other Important Matters. Prior to concluding the discussion, the mediator should ask the party if it has any other concerns that it would like to discuss. This is when potential logistical concerns may be uncovered (e.g., the need to leave early on the day of the mediation, childcare issues, the desire to record the mediation session, potential impact the lack of representation would have on the parent when the school district is represented). The likelihood of success may be improved by addressing any logistical concerns prior to the mediation session.

Sometimes more than one call to a party may be required (e.g., to address a logistical concern or a new issue arises) and should be accommodated.

Follow-up, written communication to each party / both parties

summarizing the discussion may be a good idea, particularly when the parties reached agreement on, for example, the process, participants, and the like. Parties should also be reminded in writing of anything they agreed to do prior to, or in preparation for, the mediation session.

III. THE MEDIATION SESSION

A. Attacking the Issues. Most special education lawyers litigate remedies. Not surprising, most parents do so as well. It is much easier to advocate for what someone wants to walk away with rather than spending the time explaining why a particular award/remedy is necessary. Identifying the precise issue(s) is, therefore, key to crafting an agreement that truly addresses the concerns that led to the parties seeking the assistance of a third-party neutral to help resolve their differences.

It is not an unusual occurrence for some mediators to attempt to resolve what s/he perceives the easiest issue – why not pick the low-hanging fruit?! – as it might jumpstart settlement momentum and validates the process should the parties reach agreement on the issue. While this may be a worthwhile technique with some credibility behind it, we would suggest that consideration first be given to addressing, if more than one, the issues as they would be addressed in the special education process. For example, issues relating to establishing needs (i.e., interpretation of assessment data, need for additional assessments) must be resolved first before addressing any necessary changes to the student's annual goals, program, services, and accommodations. Similarly, unless there is agreement on the former, there cannot be a meaningful discussion about an appropriate placement that correlates to the student's needs. "Mapping" in this way, when appropriate, allows the mediator to guide the parties through the natural progression of the special education process, which should result in an agreement grounded on the student's actual needs.

After addressing these more fundamental issues, which typically are the most important issues, any secondary issues (e.g., enforcement of the agreement) can be addressed.

B. Avoiding History. Unlike in most mediation contexts, in special education disputes, given the parent-school district relationship, there is usually considerable history between the parties, often sordid and sometimes lengthy. The mediator might borrow from President John F. Kennedy in paving a path forward – trying to chart a course for the future, not assessing who's to blame for the past. A bit of history may be relevant and necessary, but mostly just takes up time and unnecessarily stirs up bad feelings. Again, a bit of direction can keep things on track.

This is not to say that a party should never be allowed to vent pent-up

anger. Allowing a party to "speak one's mind," at least initially, sometimes actually helps the party to get to a place where s/he would be receptive to resolving the underlying dispute, as anger can interfere with keeping an open mind.

C. Reimbursement Items. When the disputed issues in a mediation involve more than one reimbursement request and it is apparent to the mediator that a piecemeal approach is not working or may not work, we would suggest addressing the issues by lumping the reimbursement amounts together (i.e., an aggregate approach). Doing so has two advantages. First, the mediator avoids negotiating the amount of each item separately and rather focuses on a total amount. Second, if the school district has difficulty reimbursing for a particular item (e.g., a particular methodology or attorneys' fees) for whatever reason (i.e., knowledge being made known to other parents/public), the reimbursement can be softened/buried.

D. Creating Movement. There are many methods to get the parties to move past an impasse or to close the gap between the parties, including anchoring (i.e., focus on gains over losses), reality testing, use of hypothetical negotiation (e.g., "What if x was offered?"), and bracketing (i.e., proposing a demand conditioned on a particular response). Some are more passive than others. Again, we find that in special education mediation, a more direct approach yields better results. This would include – depending on the experience of the mediator, the trust the parties have of the mediator, and the mediator's familiarity with special education law – providing the parties with a candid assessment of the relative strength of their respective cases should the matter proceed to due process.

E. Pin It Down. Too often, when the parties are represented and have reached agreement in principle, the attorneys want to hash out the details at a later time. We would discourage mediators from allowing this (whether the parties are represented or not), as it can cause problems from lack of follow-up to the parties walking away from finalizing their agreement because of disagreements about the details. If possible, and it usually is with a bit of urging, have the parties hash out the details while everyone is in the room, obtain any additional information needed, and seek to have the agreement signed on the spot. It will take longer but the time will be well spent.

The typical essentials for a good mediation agreement are that it be understandable (in words the parties would use), appealing (avoiding reasons/explanations that risk stirring up bad feelings) and precise regarding the path forward (i.e., exactly what's to be done, who is responsible for doing it/see that it is done and by when is it to be done). This latter aspect (i.e., precision of path forward) is deemed critical by most parents because it establishes accountability and potential

enforcement.

A good agreement should also address any other concurrent and relevant IDEA processes (e.g., if any changes to the student's IEP are required, how and when will it be done; if there is a pending due process hearing/State complaint/lawsuit, to what extent does the agreement resolve same and what will/should happen with said proceeding).

F. Waiver of IEP Meeting. Generally, when the parties agree to make changes to the student's IEP during a mediation session, rather than reconvene an IEP team meeting, the parties can agree to modify the IEP in writing pursuant to 34 C.F.R. § 300.324(a)(4) without convening an IEP team meeting. Such practice eliminates any potential problems that can arise at the IEP meeting, saves time, and affords the parties the use of a mediator to facilitate the discussions of the details. Typically, any required forms are appended to the mediation agreement.

Said practice is consistent with the New York State requirement that, if the parties reach an agreement during a mediation session to change the student's IEP, the student's IEP must be immediately amended to be consistent with the mediation agreement. *See* 8 NYCRR § 200.5(h)(5).

G. Enforcement of Mediation Agreement. Many parents would question whether the words on the page would mean anything to the school district once the parties have left the mediation. Explaining to the parent that the agreement is enforceable in a court of law is meaningless since, for most parents, courts are beyond their financial reach. Moreover, court proceedings take time and open the parties to years of potential litigation. An alternative consideration is, when feasible, to address enforcement in the agreement itself. This may be by having the parties mutually agree to an individual – whether school personnel or third party – who would be the final arbiter of any enforcement disputes. The advantages to either side is that it provides for a mutually agreed upon decision-maker, a mechanism that may be less costly than the alternatives, and is final.

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