## Questions and Answers on Mediation



#### What is Mediation?

- \* An impartial system that brings proper parties who have a dispute together to confidentially discuss disputed issues with a neutral third party, with the goal of resolving the disputes in a binding written agreement.
- \* Under IDEA mediation is voluntary on the part of the parties.
- \* Mediation can include parents, representatives of the LEA or SEA, or other public agencies responsible for FAPE.

  See 34 CFR 300.506

#### When is mediation available?

- \* IDEA provides for the option of mediation whenever a due process hearing is requested.
- \* Each party may end the mediation process at any stage.
- \* Public agencies are strongly encouraged to offer mediation or other alternative systems of dispute resolution whenever disputes regarding a child's educational program arise.

See 34 CFR 300.506

## How is mediation different from due process hearings?

#### Both mediation and due process hearings...

- \* may be initiated for similar disputes;
- \* have the goal to achieve resolution of disputed issues;
- \* are initiated by either a parent or a public agency;
- \* are conducted by an impartial individual.

Issues in dispute in either mediation or due process hearings may be about any matter in proposals and/or refusals to initiate or change:

- \*identification, evaluation or individual placement of a child with a disability; or
- \*provisions of FAPE to the child.

#### **Under mediation:**

- parties establish ground rules;
- parties identify potential remedies; and
- the process is voluntary at every phase.

#### In a due process hearing:

- once one party has initiated the process, all necessary parties must participate;
- remedies are established under applicable Federal and State law.

- \* The hearing officer makes conclusions of fact and law and renders a legal judgment, including specific remedies.
- \* Decision of hearing officer is binding, unless appealed.

#### by contrast....

- \* Mediator acts as facilitator and does not pass judgement on specific issues.
- \* Written mediation agreement is also binding, but more difficult to appeal under most states' contracts law.

Negotiations, discussions and settlement positions of a party in a mediation session are generally confidential.

#### by contrast....

A due process hearing:

- \* may be, under certain conditions, open to the public;
- \* is more formal.

See 34 CFR §§ 300.506, & 300.507

#### What is a mediator?

#### A mediator...

- \* is an impartial individual who conducts the mediation process;
- \* attempts to resolve disputes by facilitating discussion between the parties to reach agreement;
- \* may not be an employee of any LEA or State agency receiving a subgrant for any fiscal year, or an employee of an SEA providing direct services to a child who is the subject of the mediation process;
- \* must not have a personal or professional conflict of interest.

See 34 CFR §§ 300.506(c)(1)

# If a mediator is paid by an LEA or State agency, is this a conflict of interest?

A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency solely because he or she is paid by the agency to serve as a mediator.

See 34 CFR § 300.506(c)(2)

#### How is a mediator selected?

The success of mediation is related to the trust and commitment to the process of both parties. To build trust and commitment IDEA provides two options in selecting an impartial mediator.

- (1) The State maintains a list of qualified mediators, knowledgeable in laws and regulations relating to the provision of special education and related services.
- (2) If a mediator is not selected on a random basis from the State -maintained list, both parties must be involved in selecting the mediator and agree on the individual who will mediate.

See 34 CFR §§ 300.506(b)(2)

#### How is a mediator selected? (continued)

- \* The mediator must be trained in effective mediation techniques and knowledgeable in laws and regulations relating to the provision of special education and related services.
- \* The regulatory requirement for the use of a qualified mediator instructed in effective mediation techniques helps ensure that decisions about the effectiveness of specific techniques are based upon the mediator's independent judgment and expertise.

See 34 CFR §§ 300.506(b)(1)(iii) & (2)(i)

## May more than one mediator be selected to conduct a mediation under IDEA?

No, for mediation required under IDEA, each mediation is to be conducted by **one** mediator. Use of a single mediator helps ensure clear communication and accountability. However, nothing in IDEA would preclude other mediation, not required under IDEA, from being conducted by multiple mediators.

See 34 CFR § 300.506 & Attachment 1, pp. 12611 - 12612

## May current LEA employees serve as mediators?

No. For mediation <u>required</u> under IDEA, the following may not serve as mediators:

- \* a current employee of any LEA;
- \* an employee of any LEA or State agency receiving a subgrant under IDEA;
- \* an employee of an SEA providing direct services to a child who is subject of a mediation;
- \* anyone with a personal or professional conflict of interest.

See 34 CFR §§ 300.194, & 300.506(c)(1)(i)(A)

## May current LEA employees serve as mediators? (continued)

By contrast, due process hearing officers may be employees of a State agency or LEA that is not involved in the education or care of the child. This difference between the requirements for due process hearing officers and mediators was included to try and make mediation more attractive for parents and a more effective option for both parties.

See Attachment 1, pp. 12611 - 12612

#### What are the benefits of mediation?

#### Mediation benefits may include:

- \* an efficient and effective method of dispute resolution;
- \* lowered financial and emotional costs compared to due process;
- \* written agreements with increased commitment to, and ownership of, the agreement;
- \* parties control the process and decision-making, thus increasing self-empowerment;
- \* individually tailored and workable solutions, easier to implement as both parties agree on details.

Mediation may also help resolve State complaints under §§ 300.660 - 300.662. Mediation should not be viewed as creating an exceptional circumstance justifying an extension of the 60 day complaint time line.

## How long does the mediation process take?

Depends on a number of factors:

- \* type and complexity of issues presented;
- \* availability of the parties;
- \* willingness of the parties to cooperate;
- \* individual techniques used by the mediator.

The length of the mediation process cannot be used to extend the 45-day deadline to issue a due process hearing decision unless both parties agree.

See 34 CFR § 300.506 & Attachment 1, pp. 12611 - 12612

#### Where are mediation meetings held?

Mediation meetings must be scheduled in a timely manner and held in a location convenient and accessible to the parties.

See 34 CFR § 300.506(b)(4)

## Who bears the cost of paying for the mediation process?

- \* The State bears the cost of the mediation process required under the IDEA, including the costs of other meetings to discuss the benefits of mediation, and the fee charged by the mediator.
- \* States have the option to offer mediation at other times not required by the IDEA at their discretion.

See 34 CFR §§ 300.506(b)(3) & 300.506(d)

# Who may participate and attend the mediation meeting? May parents or public agencies bring their attorneys to mediation meetings, and if so, under what circumstances?

- \* Both parties need to be satisfied with the arrangements for conducting a mediation meeting, including designation of the participants at the meetings.
- \* Either party has the right not to participate in the mediation process for whatever reason, including dissatisfaction with the participants slated to be in attendance, including attendance by attorneys.

## Who may participate and attend the mediation meeting? (continued)

- \* Neither the IDEA statute nor the regulations state whether parties may be represented by attorneys or advocates at mediation meetings.
- \* An attorney's presence may have the potential for creating an adversarial atmosphere that may not necessarily be in the best interests of the child.
- \* Parents and children with disabilities particularly may wish to have their attorneys present to assist them in explaining their position and the process.
- \* If a party feels strongly about attending mediation with an attorney, and attorneys are not allowed under the State's rules, the party may choose not to attend mediation.

Mediation Q&A - Q13.2

## May the child with a disability who is the subject of the mediation process attend the mediation?

- \* Yes. Parents may choose to have the child present for all or part of the mediation. For some youth participating in the mediation may be a self-empowering experience. The appropriateness of attending generally depends on the age and maturity of the child.
- \* The IDEA also contains provisions that greatly strengthen the involvement of students with disabilities in decisions regarding their own futures. Because transition planning and transition services are designed to take into account the student's preferences and interests, it is appropriate for a student with a disability receiving these services to attend and participate in the mediation process.

## May the child with a disability who is the subject of the mediation process attend the mediation? (continued)

\* Finally, if the State elects to provide for the transfer of rights from the parents to the student at the age of majority, then the student will attend and participate in the mediation meetings.

See 34 CFR Part 300, Appendix A (p. 12473, question #6)

## May a State use IDEA funds for recruitment and training of mediators?

Yes. A State may use funds it retains under § 300.602 for recruitment and training of mediators.

Specifically, funds may be used for:

- \* support and direct services, including TA and personnel development and training; and
- \* to establish and implement the IDEA required mediation process, including paying for mediators and support personnel.

See 34 CFR §§ 300.370(a)(1) & 300.370(a)(3)

#### May an SEA use IDEA funds to establish and implement the mediation process, including providing for the costs of mediators and support personnel?

Yes. An SEA may use IDEA funds to establish and implement the mediation process, including providing for the costs of mediators and support personnel.

34 CFR § 300.370(a)(3)

## May a public agency require a parent's participation in the mediation?

No. Neither the IDEA nor its regulations allow a public agency to require a parent to participate in mediation prior to a due process hearing. A public agency may require parents who elect not to use mediation to meet, at a time and location convenient to the parents, with a disinterested third party who can discuss the benefits of mediation and encourage parents to use the process. Nonetheless, mediation may not be used to deny or delay a parent's right to initiate an impartial due process hearing or deny any other rights under the IDEA.

See 34 CFR § 300.506(d)

Mediation Q&A - Q17.1

### May a public agency require a parent's participation in the mediation? (continued)

The disinterested third party may be under contract with:

- \* a parent training and information center;
- \* a community parent resource center; or
- \* an appropriate alternative dispute resolution entity.

See 34 CFR § 300.506(d)

May parties to the dispute in a mediation process be required to sign a confidentiality pledge or agreement prior to the commencement of the process? If so, what is an example of such an agreement?

Yes. Parties to a mediation process may be required to sign a confidentiality pledge or agreement prior to the commencement of mediation. Furthermore, discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceedings.

See 34 CFR §§ 300.506(b)(5) - (6)

## What is an example of a confidentiality agreement?

Such a pledge or agreement should address these points:

\* The mediator, the parties and their attorneys agree that they are strictly prohibited from revealing to anyone, including a judge, administrative hearing officer or arbitrator the content of any discussions which take place during mediation.

## What is an example of a confidentiality agreement? (continued)

- \* The parties and their attorneys agree that they:
  - \* will not at any time, before, during, or after mediation, call the mediator or anyone associated with the mediator as a witness in any proceeding concerning this dispute;
  - \* will not subpoena or demand the production of any records, notes, work product or the like, of the mediator in any proceeding concerning this dispute.

## What is an example of a confidentiality agreement? (continued)

- \* If either party decides to subpoena the mediator or the mediator's records, the mediator will move to quash the subpoena. The party making the demand agrees to reimburse the mediator for all expenses incurred.
- \* The exception is that this agreement to mediate and any written agreement made and signed by the parties as a result of mediation may be used in any relevant proceeding, unless the parties agree in writing not to do so. Information otherwise subject to discovery shall not become exempt by virtue of it being disclosed during mediation.

Mediation Q&A - Q18.4

### What is an example of a confidentiality agreement? (continued)

Enforceability of a mediation agreement will be based upon applicable State and Federal law.

See, 34 CFR § 300.506 & Attachment 1, p. 12612

# Must an agreement reached by the parties in a mediation process be in writing?

Yes. Agreements reached by the parties to the dispute in a mediation process must be set forth in a written mediation agreement. The requirement that mediation agreements reached by the parties be in writing does not apply to mediation not required by the IDEA.

34 CFR § 300.506(b)(5)

## When is due process available under the IDEA?

The IDEA gives parents and school districts under the final regulations of the IDEA the right to request due process hearings at any time the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

SEAs must ensure that due process hearings are provided when requested.