

VIRGINIA DEPARTMENT OF EDUCATION
Division of Special Education and Student Services
Office of Dispute Resolution and Administrative Services

ADMINISTRATION OF THE VIRGINIA
SPECIAL EDUCATION
MEDIATION SYSTEM

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PREFACE

Mediation programs for special education issues have a history of development in states reaching back to 1974. In 1997, the *Individuals with Disabilities Education Act* (IDEA) for the first time required that each state provide a mediation system to be available to parents and schools as needed for special education matters. Subsequently, the Virginia Department of Education (VDOE) assembled stakeholders and developed a guidance document for the operation of a statewide special education mediation system. This document was revised in 2000 and then again in 2009 to reflect changes in the 2004 IDEA, 20 USC §§1400 et. seq, and the 2006 implementing federal regulations, 34 CFR Part 300. This current edition mirrors those requirements and the provisions of the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, January 25, 2010.

In the ten years that the mediation program has been available in Virginia, it has been highly successful, leading to a resolution between 76-82% of the time when people come to the table to work with a mediator.

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See Special Education Mediation.

PROMOTING MEDIATION

Typically, special education contested issues are quite varied because they can apply to changes in students' goals, implementation strategies to reach those goals, and individuals to be involved in implementing these strategies. Furthermore, these conflicts often develop quickly and have adverse consequences for the provision of services and working relationships between parents and educators (Gallant, 1982).

Since the late 1970's, there has been much interest in developing insights into the underlying causes of special education disputes and conflict management in an effort to serve students with disabilities more effectively in schools. In the early 1980's, the publications on special education conflicts that began appearing with some regularity (e.g., Kerr, 1981) suggested a major factor in the onset of special education conflicts was the lack of experience in working within the parameters of the controlling legal mandate (IDEA's predecessor, Public Law 94-142) passed in the 1970's. Also, there was the belief that with the passage of time, many problems related to the provision of special education services would be ameliorated (e.g., Pryzwansky, 1983).

As the 1980's came to a close, however, many observers concluded that the optimism regarding the management of special education conflicts was not warranted because data indicated a growing incidence of special education disputes. For example, in Maryland the number of special education conflicts referred to the independent hearing process increased by 29 percent from the 1984 to 1988 fiscal years (Staff, 1990).

As a result of the growing incidence of special education conflicts, many states began establishing state-sponsored mediation systems for disputes arising over the delivery of special education and related services to students with disabilities. Singer and Nance (1985) reported that early developers of state sponsored mediation systems identified several characteristics of this special education conflict management service: mediation is a process easily understood by participants and is very effective and efficient.

As special education mediation services became operational, researchers studied the systems and concluded that a major attraction for mediation was that, unlike other conflict management approaches in special education, it typically fostered more harmonious relationships between parents and educators (Goldberg and Kuriloff, 1991).

As anticipated by many observers of the growing popularity of mediation for resolving special education disputes, Congress mandated in the Individuals with Disabilities Education Act (IDEA) of 1997 that all state educational agencies establish and implement procedures to allow disputants to mediate special education conflicts.

ELEMENTS OF MEDIATION

The Virginia Department of Education (VDOE) is responsible for the administration of the Virginia's special education mediation services, as required by the federal special education law, IDEA 20 USC §1415(e) and the implementing regulations, 34 CFR 300.506 *et seq.* The management of the special education mediation services is the responsibility of the Office of Dispute Resolution and Administrative Services (ODRAS).

Mediation is a voluntary process that gives participants the opportunity to meet with independent third-party facilitators to assist them in resolving disputes. The mediator uses a variety of problem-solving methods including clarifying issues, identifying interests, determining areas of agreement, and helping parties to self-determine an outcome. The mediator provides a problem-solving structure and process and assures that everyone will be listened to with respect. The mediator does not make decisions for the parties.

Any issue regarding a child's identification, evaluation, eligibility, educational services or placement, or the provision of a free appropriate public education may be mediated at any time, including prior to the filing of a complaint or request for the due process. Parents and school personnel are always encouraged to resolve issues at the earliest time possible.

Parents and a school administrator may join in a request for mediation at any time there is a disagreement about the services being provided the child. Participation in mediation, however, is voluntary on the part of both parties. If a unilateral request is made, VDOE's Coordinator of Mediation Services contacts the other party to inform him/her about his/her choice and to determine his/her interest in making a joint request.

Timelines have not been established for the completion of the mediation process other than those for the appointment of the mediator. Because special education regulations require that mediation not be used to deny or delay a parent's right to a due process hearing or any other rights, however, it is expected that the mediation process, from the assignment of the mediator to the resolution agreement, will be completed within three weeks. If the parent or school division has requested a due process hearing or raised a complaint, the VDOE dispute resolution staff will coordinate with all parties to make sure that the relevant timelines are enforced to ensure protection of parental rights and the best interests of the child.

As required by the IDEA regulations, the Coordinator of Mediation Services randomly assigns a single mediator from the list of approved mediators. The mediator is required to disclose any possible conflict of interest that may exist with any party to the contested issues.

As a general rule, parties in mediation are the parent and school division representative. "Parent" is defined in accordance with the federal and state regulations governing special education. The "school division representative" should be someone consistent with the criteria for the LEA (local educational agency = local school division) representative required for an IEP team under state regulations governing special education. The school division representative

should have the authority to commit to any agreement reached by the parties during mediation.

The purpose of mediation is to permit the participants to work with an impartial third party to seek an agreement.

Parties are notified in advance who will attend the session. To that end, the participants should notify the mediator well in advance of the scheduled mediation who they intend to bring to the mediation session. In order to ensure that those in attendance are full participants in the mediation meeting, accommodations, including foreign language interpreters and interpreters for the deaf or hearing impaired, are provided, if needed.

The mediation is held in an agreed-upon location within the school division that is physically accessible and convenient to participants. The parent may request a neutral location.

The mediator may have access to the student's record, at his or her discretion, if necessary to prepare for a mediation meeting. The mediator is bound by the requirements of the Family Education Rights and Privacy Act to protect the confidentiality of any information secured from the review of the student's record.

Once an agreement is reached and signed, it becomes part of the student's educational record. Mediation proceedings are considered confidential and no admission, representation, or statement made during the mediation process may be used as evidence in any subsequent due process hearing or civil proceeding. The mediator will not reveal anything discussed in mediation without permission of both of the parties, unless all parties agree in writing to waive confidentiality of the agreement or other communications. Only the signed agreement may be used in future hearings or litigation.

Both parties sign the agreement. It must include a confidentiality pledge. It stands as a contract and is enforceable in any State court of competent jurisdiction or in a district court of the United States.

VDOE is not responsible for monitoring the implementation of the agreement between the parties. If an issue(s) in the agreement needs to be incorporated in the student's IEP, then that portion(s) of the agreement is forwarded to the IEP team for its consideration. Implementation of the student's IEP is subject to the federal and state regulations governing special education.

If the issue(s) in the mediation agreement is non-IEP related and one of the parties defaults on the agreement, the options for resolving the default are to request another mediation session and/or initiate action in the local court of jurisdiction. The default of the agreement may not be the subject of a special education complaint or due process hearing. The underlying issues in the dispute, however, may be raised in the other dispute resolution options of a complaint or request for due process in accordance with the regulations governing special education.

If mediation is requested when a complainant files a complaint on the same issue with VDOE, the complaint investigation will proceed according to the federal and state regulations governing special education and the complaint resolution procedures. VDOE may, however,

extend the timelines for completion of the complaint process if the parties involved agree to extend the time to engage in mediation.

If a due process hearing is requested in the same period as has a mediation, the 30 day resolution period required by the federal and state regulations governing special education for resolving the due process issue(s) may be extended by a joint written request of the parties to the hearing officer. The request must be made within the 30 days of the request of the due process hearing.

The federal and state laws and regulations governing special education are clear that during the pendency of a due process hearing, the child's educational status remains the student's current placement ("stay-put"), unless the parent and school division agree to an alternate placement directed by the student's IEP. This "stay-put" provision extends to mediation only when mediation occurs during the due process proceedings. Because the current federal and state regulations governing special education include the "stay-put" provision only during the pendency of due process hearings, the same provision does not apply during mediation outside of the context of due process hearings.¹ Mediation may also be requested to resolve a complaint that has been filed under VDOE's complaint resolution procedures. However, the "stay-put" provision does not apply to the complaints system.²

THE ROLE OF ADVOCATES AND ATTORNEYS IN MEDIATION

Mediation is a non-adversarial process, which offers the principal participants an opportunity to communicate and to resolve the issues directly with one another with the assistance of a mediator. Mediators typically ask parties who have direct knowledge of the student to speak about their own concerns and observations. Attorneys or advocates may be brought into the process by parents or school staff. In the event that this is anticipated, the mediator should be notified well in advance, in order to allow the other party to consider whether or not they should consider seeking representation.

If they participate in mediation, attorneys may be "silent" advisors, who listen and counsel as needed. In some cases, attorneys or advocates may take a more active role in assisting their client to present information and settlement proposals. If a party defers to the attorney or advocate to speak for them in mediation, the mediator will direct their questions to that representative, offering the principal party the opportunity to add comments or to ratify statements made during the mediation.³

¹ Even though the term "stay put" applies strictly to matters in due process actions, the "effect" of the term remains the same for non-due process actions and/or complaints because of Virginia-specific regulations governing parental consent. If parents refuse to consent to an IEP, then the last agreed upon IEP remains in effect until the issue(s) related to the parent's refusal are resolved. In other words, the school division may not implement an IEP in which the parents refuse consent, and must continue to implement the last agreed upon IEP, unless the parent and school division agree otherwise.

² *Id.*

³ "The Role of Attorneys in Special Education Mediation," Feinberg and Beyer, 2001.

Mediators call the parties in advance of the meeting for scheduling purposes and to describe their role, the mediation process, and to answer any questions of the parties. At the mediation conference, mediators may choose to meet with the parties in caucus, to provide them with an opportunity to consider issues and options privately. The legal principle of *ex parte*⁴ conversations applies in administrative proceedings, such as due process, and court proceedings wherein hearing officers and judges are not permitted to listen to or discuss matters about the case without the benefit of both parties and/or their legal counsel present. The principle of *ex parte* conversation does not apply to mediators, who are not advocates, finders of fact, directors of outcomes, or decision makers.

OPERATION OF THE MEDIATION SERVICES

VDOE recruits, trains and maintains a panel of eight mediators who act as independent contractors.

VDOE provides selected mediators with initial training and annual training programs to promote the delivery of quality mediation services to participants in mediation. Prospective mediators are required to attend the initial training program to be included on the approved roster of mediators. All mediators are required to attend the annual training program to remain on the list. Optional training opportunities (e.g., mentoring) are offered periodically to the mediators. Mediators are reimbursed for travel expenses incurred to attend training.

The Coordinator of Mediation Services (Coordinator) provides annually to each mediator a "Mediator Expectation Agreement". Each mediator is required to sign the agreement before continuing to work for the Virginia Special Education Mediation System. The Agreement details such elements as: evaluation requirements, maintenance of confidentiality, compliance with timelines and submission of forms, participation in training as required, conditions for removal from the roster and VDOE approved payment schedules.

Mediators are evaluated at least annually through observation by the Coordinator. If the performance of a mediator is rated ineffective, the Coordinator reviews the matter with the Director of ODRAS for further remedial action or removal of the mediator. Also, a mediator can be removed by submitting a letter of resignation, by violating a provision of the expectation agreement, or by refusing a case assignment without reasonable cause.

Consumer evaluations are provided to participants at the mediation conference. They are mailed to the coordinator, who reviews the comments. The Coordinator may then review issues raised with the participants and mediator. Some comments may suggest topics for future training and supervision.

As additional mediators need to be recruited and selected, the Coordinator and the Director of ODRAS initiate a recruiting and selection process for this purpose.

⁴ In Virginia, an *ex parte* communication is defined as "one in which an advocate for two or more parties presents his views on the controversy to the decision maker." *Ex Parte* Contact Means Presentation of Data or Arguments on Merits of the Case," Op. Atty' Gen 4-5, 1982-83.

INITIATION OF THE MEDIATION PROCESS

If both the parents and school division agree to mediate special education issues, a school division staff member requests the assignment of a mediator by submitting a request form to the Coordinator of Mediation Services (Coordinator). The Services Request Form requires the LEA to: (1) specify the student's name; and (2) indicate interpreter needs and accessibility needs (if any) for the mediation session. Both participants are required to sign and date the request form. The request form must also include the contact information for the participants. The services request form is available on VDOE's web site at:

http://www.doe.virginia.gov/special_ed/resolving_disputes/mediation/forms/request_form.pdf
or by calling the Office of Dispute Resolution and Administrative Services at 804-225-2013.

If the student is currently receiving special education services, the LEA is required to submit a copy of the IEP's "Present Level of Performance" (PLOP) with the services request form.

VDOE obtains interpreters if needed for the mediations. Information regarding the need for interpreters and status of any other dispute resolution services is to be recorded on the services request form. ODRAS' staff are responsible for ensuring interpreter services are provided for the mediation, as requested by the parties or mediator.

The Coordinator checks with other ODRAS staff to determine if there is a pending due process or complaint action. The Coordinator notifies the ODRAS' complaint specialist, or for due process, the Coordinator of Due Process Services, of the mediation request. The Coordinator maintains the timelines and advises the complaint specialist and Coordinator of Due Process Services of the disposition of the mediation proceedings.

Within two days following receipt of a request for mediation services, the Coordinator randomly assigns a mediator giving particular attention to geographic location, previous assignments, and availability. VDOE sends to the assigned mediator: mediator's assignment letter; copy of the mediation services request form; case status update; confidential information agreement; case closing form; information about disputant's involvement (if any) with any other conflict management services and related information; and a copy of the IEP's PLOP when provided by the LEA. VDOE sends written notice of the mediator's assignment to the participants and the mediator.

In order for mediators to prepare themselves and participants in mediation, it is critical that mediators provide the parties adequate notice of those individuals who will attend the mediation. Mediators provide this notice (electronically, facsimile, in writing, telephonically⁵) to the parties well in advance, as the mediation date is being scheduled, but in no case less than three (3) business days before the mediation. This allows for any necessary accommodations to be made in order that those persons attending can be full participants at the mediation. It also

⁵ If telephonically, the mediator documents in the mediation file the essential points of the phone discussion.

allows the mediators to inform parties that either school staff or parent(s) are planning to invite an attorney, advocate, or person with special education knowledge of the child.

Parents may propose that certain school staff attend the mediation. The mediator must advise the school division representative of this request; however, the determination of the school personnel's attendance at the mediation rests with the school division.

Should either party advise the mediator of other attendees outside the scope of these procedures, or arrive at the mediation with these individuals without notice, then the mediator's option is to consult with the other party as to any objection. The decision regarding who attends the mediation ultimately rests with the mediator.

CONDUCTING MEDIATION

In the Virginia Special Education Mediation Services, mediators may only provide services in accordance with the procedures outlined in this document.

The mediator strives to facilitate resolution of the special education dispute. The approaches and format used to resolve the dispute are left to the discretion of the mediator. The mediator or parties may terminate the mediation process at any point if resolution appears unlikely.

If the mediation process is terminated without an agreement being reached, the mediator informs the participants of their due process and formal complaint options for addressing the unresolved issues.

The mediator informs the parties that s/he does not provide legal advice. Any mediated agreement may affect the legal rights of the parties. Each party to the mediation has the opportunity to consult with independent legal counsel at any time. Each party may have a draft agreement reviewed by counsel before signing. The mediator identifies the deadline for completing the consultation.

A successfully mediated resolution to a special education dispute is written in the parties' native language. The mediator keeps the original copy of the agreement and provides participants with copies.

Upon completion of a case, whether it is resolved or not, the mediator provides information to VDOE using a standard report form. In completing the report about a resolved case, the mediator furnishes data that include the following items:

- A. length of mediation session
- B. description of any third-party consultation
- C. key issues in the dispute

D. a copy of any agreement reached

For unresolved cases, the mediator completes relevant sections of the report about the length of the session, and a list of the key issues in the dispute.

The mediator is responsible for submitting the report to VDOE within 10 administrative days of the date on which agreement was signed in a resolved dispute or the termination of the mediation process in an unresolved case.

PAYMENT OF MEDIATION COSTS

The Virginia Department of Education ensures the following provisions:

- VDOE compensates mediators for conducting assigned mediation cases at ODRAS' approved rate per case for preparation and conduct of the case. This is a straight fee, regardless of the number of actual meetings necessary to conclude the case.
- VDOE establishes the fee schedule, reviews it periodically, and makes adjustments to it as necessary.
- VDOE compensates mediators according to state reimbursement guidelines for travel expenses associated with conducting assigned mediation cases, and mandated VDOE training.
- VDOE pays directly for the services of non-English language interpreters and interpreters for the deaf and hearing impaired for services rendered at mediation meetings.
- VDOE does not compensate the participants for any expenses, including the cost of any third-party consultations, advocate's fees or attorney's fees. Mediated agreements do not address attorneys' fees. VDOE encourages attorneys to privately work out attorneys' fees so that the mediation may freely focus on the special education issues.

The Virginia Department of Education follows the Virginia Prompt Payment Act by processing:

- The mediator's request for reimbursement. The mediator must submit the request for payment within 10 administrative days of the completion of the case on VDOE's standard form for this purpose. Minimal information solicited on the form will require verification that the case was prepared, the number of mediation meetings (if any), and the actual mileage traveled to and from meetings.
- Requests for reimbursement from interpreters (for deaf and hearing impaired and non-English speaking participants) on an invoice or request for payment.
- Requests for reimbursement from translators for translating mediation agreements into non-English languages or other communication formats on an invoice or request for payment.

MONITORING MEDIATION CASES

In order to monitor the timelines for the Mediation services, VDOE maintains a log or computerized data tracking system for each case. This log indicates the case number, student's and school division's name, region, date of the receipt of the request, the name of the mediator and date the case was assigned, the date the case was mediated and completed, the date of receipt of the final report, the date of closing and issue codes.

DATA REPORTING

VDOE reports summary information about mediation activities in the Annual Report of the Office of Dispute Resolution and Administrative Services. This report is available on the office's website. Additionally, VDOE provides data relative to the percent of mediations held that resulted in mediation agreements as required by Indicator 19 of Virginia's Annual Performance Report to the U.S. Department of Education. This report is also available on the VDOE Web site.

PROVIDING TECHNICAL ASSISTANCE

The Coordinator of Mediation Services processes and responds to requests for technical assistance and training. This can develop from requests from school divisions or parent groups. Assistance may also be sought as a result of data developed from school performance plans and annual performance data.

CONFIDENTIALITY OF RECORDS

The Office of Dispute Resolution and Administrative Services is responsible for maintaining the file record and data base information on each mediation in its possession. ODRAS is also responsible for ensuring the confidentiality of all records associated with the mediation system. ODRAS' mediation records are archived annually in accordance with the Virginia Department of Education's Records Retention and Disposition Schedule with the Library of Virginia.

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