



# The Individuals with Disabilities Education Act (IDEA): Mediation Provisions

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## Summary

Mediation is a flexible and informal process in which a third party assists individuals to resolve a conflict. The mediator is trained to facilitate discussions of each participant's issues. The goal is to create an agreement that resolves differences and enhances the relationship between the disputants. The mediator, unlike a judge, does not make decisions regarding the outcome of the matter; rather, the participants make these decisions. The Individuals with Disabilities Education Act, IDEA, 20 U.S.C. §§1400 *et seq.*, requires that mediation is to be voluntary but educational agencies must ensure that procedures are established and implemented to allow parties to a dispute to solve their dispute through mediation. The mediation is to be conducted by a qualified and impartial mediator who is trained in mediation techniques and the cost is to be borne by the state. The state or local educational agency may establish procedures to offer to parents and schools who choose not to use mediation an opportunity to meet with a disinterested party to encourage the use of mediation. IDEA leaves the decision of whether or not to allow attorneys to participate in mediation up to the individual states.

This report discusses the statutory and regulatory requirements of IDEA, judicial decisions, and the concept of mediation as it applies to special education. It will be updated as developments warrant.

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As originally enacted, IDEA contained no specific provision for mediation but the Department of Education had noted that states had had success in using mediation as an intervening step prior to a formal due process hearing. The Department encouraged the use of mediation and found that the use of discretionary grant funds for reimbursement of mediation fees was a permissible expenditure.<sup>5</sup>

In 1997, P.L. 105-17 added statutory language on mediation. When this statute was being considered, Congress indicated its “strong preference that mediation become the norm for resolving disputes under IDEA.”<sup>6</sup> The Senate and House reports further stated that “the committee believes that the availability of mediation will ensure that far fewer conflicts will proceed to the next procedural steps, formal due process and litigation, outcomes that the committee believes should be avoided when possible.”<sup>7</sup>

### **Current Statutory Provisions**

The 2004 reauthorization of IDEA kept much of the previous law regarding mediation but made several changes notably providing for a legally binding written agreement upon successful resolution of the mediation. Both the House and Senate reports for P.L. 108-446 found that the mediation provisions in the 1997 law, P.L. 107-17, had been a success. The House report noted: “Since 1997, mediation under the Act has resulted in a significant reduction in litigation and helped in restoring the trust between parents and school personnel.”<sup>8</sup> Similarly, the Senate report observed: “The committee is encouraged by the success of mediation occurring throughout the nation in resolving disputes between parties under IDEA....The committee wants to build upon this success by encouraging parties to consider mediation as an option at earlier stages of disagreements and disputes.”<sup>9</sup>

Currently, IDEA requires that any state or local educational agency that receives funds under part B of IDEA must ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint, to resolve the disputes through a mediation process.<sup>10</sup> It is left up to the states to determine whether or not to allow attorneys’ fees for a mediation that is conducted prior to the filing of a complaint.<sup>11</sup>

IDEA also lists requirements for mediation.

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(...continued)

*Columbia*, 348 F.Supp. 866 (D.D.C. 1972). For a more detailed discussion of these cases and the congressional intent behind the enactment of P.L. 94-142, see CRS Report 95-669, *The Individuals with Disabilities Education Act: Congressional Intent*, by (name redacted).

<sup>5</sup> Department of Education Policy Letter, EHLR 213:245 (March 15, 1989); Department of Education Policy Letter, 18 IDELR 279 (August 7, 1991).

<sup>6</sup> S.Rept. 105-17, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 26 (1997); H.Rept. 105-95, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 106 (1997).

<sup>7</sup> *Id.* at 26-27; 106.

<sup>8</sup> H.Rep. No. 108-77, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 113 (2003).

<sup>9</sup> S.Rept. 108-185, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. 36. (2003).

<sup>10</sup> 20 U.S.C. §1415(e)(1).

<sup>11</sup> 20 U.S.C. §1415(i)(3)(D)(ii).

- The procedures shall ensure that the mediation process is voluntary on the part of the parties,<sup>12</sup> is not used to deny or delay a parent's right to a due process hearing or to deny any other right provided for in part B,<sup>13</sup> and is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.<sup>14</sup>
- A local educational agency or a state agency may establish procedures to offer to parents and schools who choose not to use the mediation process an opportunity to meet with a disinterested party to explain the benefits of mediation and encourage its use. The disinterested party must be under contract with a parent training and information center or community parent resource center or an appropriate alternative dispute resolution entity. The meeting is to be at a time and location convenient to the parents.<sup>15</sup>
- The state is required to maintain a list of individuals who are qualified mediators and knowledgeable in the laws and regulations of IDEA.<sup>16</sup>
- The state is to pay for mediation costs, including the costs of meeting with parents to explain the benefits of mediation.<sup>17</sup>
- Each session in the mediation process is to be scheduled in a timely manner and in a convenient location for the parties to the dispute.<sup>18</sup>
- If the mediation results in a resolution of the complaint, the parties must execute a legally binding agreement that sets forth such resolution and states that all the discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The agreement must be signed by both the parent and a representative of the agency and is enforceable in state or U.S. district court.<sup>19</sup>
- Discussions that occur during mediation, whether or not they are set forth in a written agreement, are confidential and may not be used as evidence in any subsequent due process hearings or civil proceeding.<sup>20</sup>

The latter two requirements concerning the written agreement and mediation discussions were added in the conference on H.R. 1350 which became P.L. 108-446. The conference report observed: "The conferees intend that the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process to ensure that all discussions

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<sup>12</sup> Mediation, then, is voluntary for both the educational agency and the parents.

<sup>13</sup> Part B of IDEA, 20 U.S.C. §§1411-1419, contains the grant provisions and requirements for the provision of education to school aged children with disabilities.

<sup>14</sup> 20 U.S.C. §1415(e)(2)(A).

<sup>15</sup> 20 U.S.C. §1415(e)(2)(B).

<sup>16</sup> 20 U.S.C. §1415(e)(2)(C).

<sup>17</sup> 20 U.S.C. §1415(e)(2)(D).

<sup>18</sup> 20 U.S.C. §1415(e)(2)(E).

<sup>19</sup> 20 U.S.C. §1415(e)(2)(F).

<sup>20</sup> 20 U.S.C. §1415(e)(2)(G).

that occur during the mediation process remain confidential irrespective of whether the mediation results in a resolution.”<sup>21</sup>

## **Department of Education Final Regulations**

The U.S. Department of Education (ED) issued proposed regulations for P.L. 108-446 on June 5, 2005,<sup>22</sup> and issued final regulations on August 14, 2006.<sup>23</sup> Although many of the regulatory provisions simply track the statutory language, reflect comments in the conference report,<sup>24</sup> or include provisions in prior IDEA regulations, there are places where the regulations provide more guidance or differ from the prior regulations.

The final regulations eliminate a provision from the proposed regulations relating to the signing of confidentiality pledges prior to the commencement of mediation. ED noted that the provision was included in the proposed regulations in light of the conference report language indicating that Congress intends that parties may be required to sign a confidentiality pledge.<sup>25</sup> Noting that 34 C.F.R. §300.506(b)(8) “already requires that discussions that occur during the mediation process be confidential and not be used as evidence in any subsequent due process or civil proceeding,” ED decided to remove the section on signing confidentiality pledges. However, ED observed that this removal was “not intended to prevent States from allowing parties to sign a confidentiality pledge to ensure that discussions during the mediation process remain confidential, irrespective of whether the mediation results in a resolution.”<sup>26</sup>

The previous regulations provided that the states shall maintain a list of individuals who are qualified mediators and knowledgeable about special education and that if the mediator is not selected on a rotational basis from the list, both parties must be involved in selecting the mediator.<sup>27</sup> The final regulations keep the listed requirements but also require that the SEA must select mediators on a random, rotational or other impartial basis, and delete the language regarding involvement by the other party.<sup>28</sup> ED noted in its discussion of this section that “[t]hese provisions are sufficient to ensure that the selection of the mediator is not biased, while providing SEAs additional flexibility in selecting mediators. Selecting mediators on an impartial basis would include permitting the parties involved in a dispute to agree on a mediator.”<sup>29</sup>

The final regulations also eliminated the previous regulatory section which provided that parents be advised of the availability of mediation whenever a hearing is initiated.<sup>30</sup> ED noted that “§300.507(a)(2) was replaced by §300.506(a), which incorporates section 615(e)(1) of the Act, and requires mediation to be available to resolve disputes involving any matter under this part,

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<sup>21</sup> H.Conf.108-779, 108<sup>th</sup> Cong. 2d Sess. 216 (2004).

<sup>22</sup> 70 *Federal Register* 35782, June 21, 2005.

<sup>23</sup> 71 *Federal Register* 46540, Aug. 17, 2006. ED is maintaining a website on IDEA which contains topic briefs on various topics as well as the statute and regulations, at <http://idea.ed.gov>.

<sup>24</sup> H.Rept. 779, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2004).

<sup>25</sup> 71 *Federal Register* 46696 (Aug. 14, 2006), referencing H.Rept. 108-779, 108<sup>th</sup> Cong. 2d Sess. 216 (2004).

<sup>26</sup> 72 *Federal Register* 46696, Aug. 14, 2006.

<sup>27</sup> 34 C.F.R. §300.506(b)(2) (2004).

<sup>28</sup> 34 C.F.R. §300.506(b).

<sup>29</sup> 71 *Federal Register* 46695, Aug. 14, 2006.

<sup>30</sup> Proposed 34 C.F.R. §300.507(a)(2) (2004).

including matters arising prior to the filing of a due process complaint. Section 300.506(a), therefore, expands the availability of mediation beyond that required in current §300.507(a)(2).<sup>31</sup> The previous section was, then, considered superfluous.

The statutory language requires that a mediator be impartial and the Department of Education's regulations expand upon this requirement. The regulations, which are similar to the previous regulatory section, provide that a mediator may not be an employee of a local or state educational agency that is involved in the education or care of the child. The mediator must also not have a personal or professional conflict of interest. In addition, the proposed regulations state that a mediator who otherwise qualifies is not considered to be an employee of a LEA or a state agency solely because he or she is paid by the agency to serve as a mediator.<sup>32</sup>

## Judicial Decisions Regarding IDEA Mediation

There have been few cases discussing the use of mediation under IDEA. The cases that do exist have largely dealt with the issue of whether attorneys' fees should be available for work performed during mediation and many of these were decided prior to the 1997 amendments. However, there have been several recent decisions which have touched upon other issues.

Generally, the pre-1997 cases regarding attorneys' fees found that these fees were allowable.<sup>33</sup> The rationale of these cases, however, was drawn into question by the Supreme Court's decision in *Buckhannon Board and Care Home v. West Virginia Department of Human Resources*.<sup>34</sup> Although this case did not involve IDEA, it rejected the catalyst theory (the theory that if the plaintiffs' actions served as a catalyst to change the behavior of a defendant, attorneys' fees may be awarded) as a basis for the award of attorneys' fees pursuant to a statutory provision. The cases since *Buckhannon* have largely turned on whether there was judicial involvement. In *Jose Luis R. v. Joliet Township High School District 204*<sup>35</sup> the court found that the plaintiffs failed to offer any evidence that the hearing officer approved or sanctioned the parties' mediation agreement and that without court approval or sanction the agreement was simply a private settlement and therefore attorneys' fees could not be awarded. Similarly, in *Sanford v. Sylvania City School Board of Education*<sup>36</sup> the court found that a settlement agreement was not sufficient to grant prevailing party status and thus attorneys' fees if the agreement was not judicially sanctioned. However, in *Ostby v. Oxnard Union High*,<sup>37</sup> the court found that the plaintiffs were the prevailing party since

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<sup>31</sup> 72 *Federal Register* 46696, Aug. 14, 2006.

<sup>32</sup> 34 C.F.R. §300.506(c).

<sup>33</sup> See e.g., *Masotti and Masotti v. Tuskin Unified School District*, 806 F.Supp. 221 (C.D. Calif. 1992), where the court framed the issue as the novel one of "whether fees are recoverable after a mediated dispute resolution of a child's individualized education program, without the need of a requested administrative hearing." In finding that such fees were allowable, the court noted that congressional intent was to provide the parents of children with disabilities a substantive right that could be enforced, including a right to attorneys' fees if the parents were the prevailing party. This intent was seen as broad enough to permit the award of fees for services relating to a settlement or mediation.

<sup>34</sup> 532 U.S. 598 (2001). For a discussion of the application of *Buckhannon* to IDEA see Stefan R. Hanson, "Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again," 2003 *BYU Educ. & Law J.* 519 (2003), which argues that "after *Buckhannon*, plaintiffs must either make the matter of attorneys' fees a negotiating issue in the settlement discussions or choose to appear *pro se* at the mediation where the school district may be represented by an attorney." At 544.

<sup>35</sup> 2002 U.S. Dist LEXIS 20916 (N.D. Ill. January 14, 2002).

<sup>36</sup> 380 F.Supp.2d 903 (N.D. Ohio 2005).

<sup>37</sup> 209 F.Supp.2d 1035 (C.D. Calif. 2002).



after mediation they had obtained a private settlement against the district that was legally enforceable in court and were not mere catalysts of voluntary change.

Other issues regarding mediation have also been raised. In *Pitchford v. Salem-Keizer School District*<sup>38</sup> an action was brought by parents of an autistic child against the school district for failure to provide their child with a free appropriate public education. The district court found that the IEP (individualized education program) for one of the school years at issue was sufficiently flawed to deprive the child of a free appropriate public education for that year. Rather than issue an order on the merits, the court ordered the parties to mediation to attempt to reach an agreement to avoid further litigation.

In *Amy S. v. Danbury Local School District*,<sup>39</sup> the parents of a child with Asperger's Syndrome requested extended school year services for the child, were denied, and filed a request for a due process hearing. The parents agreed to mediate with the school, and they signed a written settlement agreement providing in part for tutoring, and stating that all issues relating to the child's education were resolved up to the date of the agreement. The parents alleged other violations of IDEA and signed another mediation agreement. Afterwards, the parents filed a complaint in district court alleging violations prior to the dates of the signed mediation agreements. The district court concluded that the mediation agreements precluded a review of the parents' claims and the court of appeals agreed, emphasizing that the parents had been represented by counsel when they signed the agreements and the parents did not claim that they entered into the agreements against their will or without knowledge of the issues.

## Use of Mediation in Special Education

### GAO Report

In September 2003, GAO issued a report on disputes in special education which reviewed national data and obtained site data from visits to four states—California, Massachusetts, Ohio and Texas.<sup>40</sup> One national study examined found that the median number of mediations for states was four for every 10,000 students with disabilities in the school year 1999-2000.<sup>41</sup> Officials from the four states visited by GAO reported that they were emphasizing the use of mediation and had found mediation to be successful in “resolving disputes, strengthening relationships between families and educators, saving financial resources, and reaching resolution more quickly.”<sup>42</sup> Three of the four states reported that a high percentage of mediations resulted in agreements and that mediations were less costly than due process hearings.<sup>43</sup>

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<sup>38</sup> 155 F.Supp. 1213 (D.Oregon 2001).

<sup>39</sup> 174 Fed. Appx. 896 (6<sup>th</sup> Cir. 2006).

<sup>40</sup> “Special Education: Numbers of Formal Disputes are Generally Low and States are Using Mediation and Other Strategies to Resolve Conflicts,” GA0-03-897 (September 2003).

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 18.

## Benefits and Disadvantages of Mediation

Mediation for disputes arising under IDEA has been touted as an alternative to the often costly, and time consuming due process procedures.<sup>44</sup> However, commentators have seen both benefits and disadvantages to its use. CADRE, the Consortium for Appropriate Dispute Resolution in Special Education,<sup>45</sup> describes the benefits of mediation in special education as including:

- Families can maintain an ongoing and positive relationship with the school or and benefit from partnering with educators or service providers in developing their child's program.
- Conflicts that arise out of misunderstandings or lack of shared information can be resolved through mediators helping parents, educators and service providers to communicate directly with one another. Special education and early intervention issues are complex and can best be solved by working together.
- Mediation tends to be faster and less costly than adversarial approaches such as due process hearings and court proceedings.
- Mediation can result in agreements that participants find satisfactory and research shows that people tend to follow the terms of their mediated agreements.<sup>46</sup>

Several commentators have observed that mediation has disadvantages. Some of these are described as follows.

- Mediation's goal is to reach agreement between the parties; not necessarily to guarantee the provision of a free appropriate public education (FAPE). This use of mediation, therefore, might not support the provision of FAPE.<sup>47</sup>
- There is often a significant disparity in power and access to information between parents and school systems and this can lead to the weaker party, often the low income or less educated party, accepting less than they might be entitled to.<sup>48</sup>
- Courts may not examine the merits of a settlement agreement.<sup>49</sup>

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<sup>44</sup> For a detailed examination of how "real disputants" perceive special education mediation see Nancy A. Welsh, "Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value," 38 Ohio St. J. On Dispute Resolution 573 (2004).

<sup>45</sup> CADRE, a private organization, is funded by the Department of Education, Office of Special Education Programs.

<sup>46</sup> CADRE, "Considering Special Education Mediation," <http://www.directionservice.org/cadre/medinfo.cfm> See also Office of Special Education Programs, U.S. Department of Education, "Questions and Answers on Mediation" (Nov. 30, 2000), reprinted at [http://www.directionservice.org/cadre/vet\\_QAonmediation.cfm](http://www.directionservice.org/cadre/vet_QAonmediation.cfm) For a discussion of the benefits of mediation generally see [http://www.directionservice.org/cadre/med\\_benefits.cfm](http://www.directionservice.org/cadre/med_benefits.cfm). See also, Damon Huss, "Balancing Acts: Dispute Resolution in U.S. and English Special Education Law," 25 Loy. L.A. Int'l & Comp. L. Rev. 347 (2003).

<sup>47</sup> Steven Marchese, "Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA," 53 Rutgers L. Rev. 333, 336, 344 (2001). Another commentator noted a related concern as the fear that mediation may be employed when issues of law need to be decided. Edward Feinberg and Jonathan Beyer, "The Role of Attorneys in Special Education Mediation," <http://www.directionservices.org/cadre/roase.cfm>.

<sup>48</sup> Steven Marchese, "Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA," 53 Rutgers L. Rev. 333, 352-356 (2001); Andrea Shemberg, "Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?" 12 Ohio St. J. on Dispute Resolution 739, 748-751 (1997); Jonathan A. Beyer, "A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby," 28 J. Law & Education 37, 50-52 (1999).

- There is a lack of national standards for training and vagueness in state-specific standards of certification.<sup>50</sup>

## **Use of Attorneys in IDEA Mediation**

Another issue regarding IDEA mediation is whether attorneys should be permitted to participate in mediation. IDEA does not address the issue except by allowing states to determine whether attorneys' fees may be awarded for mediations.<sup>51</sup> It should be emphasized that issues relating to the use of attorneys apply both to parents seeking legal representation and to school districts seeking counsel from their attorneys. The states vary in their approaches with one study indicating that at least eight states formally exclude or discourage attorneys from participating in mediation.<sup>52</sup> Various benefits and disadvantages have been seen concerning the use of attorneys.<sup>53</sup>

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<sup>49</sup> Steven Marchese, "Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA," 53 Rutgers L. Rev. 333, 358-360 (2001).

<sup>50</sup> Edward Feinberg and Jonathan Beyer, "The Role of Attorneys in Special Education Mediation," <http://www.directionservice.org/cadre/roase.cfm>; Jonathan A. Beyer, "A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby," 28 J. Law & Education 37 (1999).

<sup>51</sup> 20 U.S.C. §1415(i)(3)(D)(ii).

<sup>52</sup> Edward Feinberg and Jonathan Beyer, "The Role of Attorneys in Special Education Mediation," <http://www.directionservice.org/cadre/roase.cfm>. The states listed in this category were Alaska, Arkansas, Delaware, Idaho, Maine, New Hampshire, Pennsylvania, and Washington.

<sup>53</sup> For a detailed discussion of the benefits and disadvantages of using attorneys in mediation see Edward Feinberg and Jonathan Beyer, "The Role of Attorneys in Special Education Mediation," <http://www.directionservice.org/cadre/roase.cfm>.

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