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The Individuals with Disabilities Education Act: Mediation Provisions

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The Individuals with Disabilities Education Act: Mediation Provisions

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 require parents who do not wish to use mediation 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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Introduction

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.[1] 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.[2] 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 require parents who do not wish to use mediation 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.

Current Law

Statutory and Regulatory Provisions

Background.

IDEA, which was originally enacted in 1975 as P.L. 94-142, provides grants to the states for the purpose of providing a free appropriate public education (FAPE) for

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[1] CADRE, "Considering Special Education Mediation," [http://www.directionservice.org/cadre/medinfo.cfm]

[2] 20 U.S.C. §1415(e). For information about state mediation programs under IDEA see [http://www.directionservice.org/cadre/state/] and NASDE, "State Mediation Systems: A NASDE Report," (1998), reprinted at [http://www.directionservice.org/cadre/qta-1a.cfm]

all children with disabilities.[3] The statute also contains detailed due process provisions to ensure the provision of FAPE. P.L. 94-142 responded to increased awareness of the need to educate children with disabilities and to judicial decisions requiring that states provide an education for children with disabilities if they provide an education for children without disabilities.[4]

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. However, 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.[5]

Current Statutory Provisions.

When P.L.105-17, the most recent IDEA reauthorization, was being considered, Congress indicated its "strong preference that mediation become the norm for resolving disputes under IDEA."[6] 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."[7] This interest resulted in statutory language on mediation.

Currently, IDEA requires that any state or local educational agency that receives funds under IDEA must ensure that procedures are established and implemented to allow parties to disputes involving identification, evaluation, or educational placement of a child with a disability or the provision of a free appropriate public education (FAPE) to resolve the disputes through a medication process. At a minimum, mediation is to be made available when a hearing is requested.[8] It is left up to the states to determine whether or not to allow attorneys' fees for a mediation.[9]

IDEA also lists requirements for mediation.

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[3] For a brief discussion of the entire statute see CRS Report RL31259, *Individuals with Disabilities Education Act: Statutory Provisions and Selected Issues*, by Nancy Lee Jones and Richard N. Apling.

[4] *PARC v. State of Pennsylvania,* 343 F.Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education of the District of 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 Nancy Lee Jones.

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

[6] S.Rep. No. 105-17, 105th Cong., 1st Sess. 26 (1997); H. Rep. No. 105-95, 105th Cong., 1st Sess. 106 (1997).

[7] *Id.* at 26-27; 106.

[8] 20 U.S.C. §1415(e)(1).

[9] 20 U.S.C. §1415(i)(3)(D)(ii).

- The procedures are to ensure that the mediation process is voluntary on the part of the parties,[10] 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,[11] and is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.[12]

- A local educational agency or a state agency may establish procedures that require parents who choose not to use the mediation process to meet with a disinterested party who is under contract with a parent training and information center or community parent information center or an appropriate alternative dispute resolution entity to explain the benefits of mediation and encourage its use. This meeting is to be at a time and location convenient to the parents.[13]

- The state is required to maintain a list of individuals who are qualified mediators and knowledgeable in the laws and regulations of IDEA.[14]

- The state is to pay for mediation costs, including the costs of meeting with parents to explain the benefits of mediation.[15]

- 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.[16]

- An agreement reached in the mediation process shall be put in writing.[17]

- Discussions that occur during mediation are confidential and may not be used as evidence in any subsequent due process hearings or civil proceeding and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.[18]

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[10] Mediation, then, is voluntary for both the educational agency and the parents.

[11] 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.

[12] 20 U.S.C. §1415(e)(2)(A).

[13] 20 U.S.C. §1415(e)(2)(B).

[14] 20 U.S.C. §1415(e)(2)(C).

[15] 20 U.S.C. §1415(e)(2)(D).

[16] 20 U.S.C. §1415(e)(2)(E).

[17] 20 U.S.C. §1415(e)(2)(F).

[18] 20 U.S.C. §1415(e)(2)(G). The House and Senate reports stated that nothing in the Act was intended to supercede any parental access rights under the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. §1232g. The reports also provided a sample confidentiality agreement. S.Rep. No. 105-17, 105th Cong., 1st Sess. 27 (1997); H. Rep. No. 105-95, 105th Cong., 1st Sess. 107 (1997).

Department of Education Regulations.

The Department of Education (ED) noted in its comments to the IDEA regulations that although the statute only requires mediation to be offered when a due process hearing is requested, "States or other public agencies are strongly encouraged to offer mediation or other alternative systems of dispute resolution prior to the filing of a request for a due process hearing, and whenever a dispute arises."[19] The regulations promulgated pursuant to P.L. 105-17 by the Department generally reiterate the statutory language described above. However, the regulations do clarify some of the statutory requirements.

The statute, as noted above, indicates that the state is to keep a list of qualified mediators. The regulations specify how a mediator is to be selected. They require that if a mediator is not selected on a random, that is a rotational, basis, both parties must be involved in the selection and agree with the selection of the individual who will mediate.[20] This language was taken from language in both the House and Senate reports.[21]

The statutory language requires that a mediator be impartial and the Department of Education's regulations also expand upon this requirement. The regulations provide that a mediator may not be an employee of (1) a local educational agency (LEA) or a state agency that receives a grant under IDEA or (2) a state educational agency that is providing direct services to the child who is the subject of the mediation. The mediator must also not have a personal or professional conflict of interest. In addition, the 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.[22]

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. Those cases that have examined this issue have found that attorneys' fees are allowable. In *Masotti and Masotti v. Tuskin Unified School District*[23] 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

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[19] 64 *Fed. Reg*. 12611 (1999).

[20] 34 C.F.R. §300.506(b)(2)(ii).

[21] "The committee intends that, whenever such a mediator is not selected on a random basis from that list, both the parents and the agency are involved in selecting the mediator, and are in agreement with the individual who is selected." S.Rep. No. 105-17, 105th Cong., 1st Sess. 27 (1997); H. Rep. No. 105-95, 105th Cong., 1st Sess. 106 (1997).

[22] 34 C.F.R. §300.506(c).

[23] 806 F.Supp. 221 (C.D. Calif. 1992).

hearing."[24] 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.

The rationale of *Masotti* was echoed by the New Jersey district court in *E.M. v. Millville Board of Education.*[25] In addition, the *Millville* court adopted the reasoning used in a case relating to attorneys' fees in settlement situations, stating that "settlement and mediation are flip sides of the same coin."[26] Rejecting an argument that the parents must request an administrative hearing and that the payment of attorneys' fees would have a chilling effect on mediation the court quoted from another case discussing settlements: "[I]t is just as likely that denying fees would protract litigation and thereby increase as school system's liability for fees. One can easily envision a situation in which the parents' attorney, knowing that fees are not recoverable for pre-hearing work performed in the absence of a hearing, would reject negotiations and attempt to obtain the desired relief through formal proceedings. On the other hand, if fees are recoverable for pre-hearing work, the parents' attorney would have no incentive to resist settlement, and the school system would have an incentive to settle cases as early as possible."[27]

In another case from New Jersey, *K.A.L. v. Salem Board of Education,*[28] the court also awarded attorneys' fees for mediation. The situation in *K.A.L.* differed from the other cases discussed above in that the mediation had been unsuccessful and the award was made based on a settlement prior to a hearing.

Newton v. Conecuh County Board of Education[29] involved somewhat different issues although attorneys' fees were also requested. In *Newton* the plaintiff had filed for a due process hearing, agreed to mediation and the mediation agreement was adopted and incorporated by the due process hearing officer as an order resolving the issues of the due process hearing request. The plaintiff brought suit to order the board of education to comply with the mediation order. The district court found that it was without jurisdiction to hear the case since the plaintiff had not exhausted her administrative remedies. The fact that the due process hearing officer had adopted the mediation agreement was not seen as indicating that a due process hearing had taken place and therefore judicial action was appropriate. The court did not reach the issue of the plaintiff's request for attorneys' fees.

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[24] *Id.* at 222.

[25] 849 F.Supp. 312 (D.N.J. 1994).

[26] *Id.* at 315.

[27] *Id.* at 315-316, citing *Rossi v. Gosling,* 696 F.Supp. 1079, 1084 (E.D.Va. 1988).

[28] 1994 U.S. Dist. LEXIS 8897 (D.N.J. June 21,1994).

[29] 1997 U.S. Dist. LEXIS 6539 (S.D.Ala. March 19, 1997).

Jose Luis R. v. Joliet Township High School District 204[30] was the only case found on mediation decided subsequent to the enactment of the 1997 IDEA Amendments although the new statutory provisions did not appear to play a prominent role in the court's decision. In *Jose Luis* the court found the argument that the mediation agreement qualifies the plaintiffs as a prevailing party and thus able to receive attorneys' fees was convincing. The mediation agreement was not seen as a private settlement simply because an administrative hearing was never held; rather, the fact that the parties' agreement was read into the record before a hearing officer was described as changing the relationship between the parties thus entitling the plaintiffs to attorneys' fees as prevailing parties.[31] This holding is in apparent conflict with the Alabama district court's decision in *Newton* which had not found the adoption of the mediation agreement by the due process hearing officer to be significant.

Pitchford v. Salem-Keizer School District[32] used IDEA mediation in a different manner than the preceding cases. *Pitchford* involved an action 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 a order on the merits, the court ordered the parties to mediation to attempt to reach an agreement to avoid further litigation.

Use of Mediation in Special Education

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. However, commentators have seen both benefits and disadvantages to its use. CADRE, the Consortium for Appropriate Dispute Resolution in Special Education,[33] describes the benefits of mediation in special education as including:

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[30] 2001 U.S. Dist LEXIS 13951 (N.D. Ill. August 29, 2001).

[31] The issue of whether or not the parents are the "prevailing party" is of increasing importance after the Supreme Court's decision in *Buckhannon Board and Care Home v. West Virginia Department of Human Resources,* 532 U.S. 598 (2001). Although this case did not involve IDEA, it rejected the catalyst theory (the theory that the plaintiffs actions served as a catalyst to change the behavior of a defendant) as a basis for the award of attorneys' fees pursuant to a statutory provision.

[32] 155 F.Supp. 1213 (D.Oregon 2001).

[33] CADRE, a private organization, is funded by the Department of Education, Office of Special Education Programs. [http://www.directionservice.org/cadre/about.cfm]

- 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.[34]

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.[35]

- 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.[36]

- Courts may not examine the merits of a settlement agreement.[37]

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[34] 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] For a discussion of the benefits of mediation generally see [http://www.directionservice.org/cadre/med_benefits.cfm]

[35] 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.directionservice.org/cadre/roase.cfm]

[36] 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).

[37] Steven Marchese, "Putting Square Pegs into Round Holes: Mediation and the Rights of (continued...)

- There is a lack of national standards for training and vagueness in state-specific standards of certification.[38]

Use of Attorneys in IDEA Mediation

One of the most litigated and discussed issues regarding IDEA mediation is whether attorneys should be permitted to participate in mediation. IDEA is silent on this issue, leaving the decision on whether or not to allow attorneys up to the states. 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.[39] Various benefits and disadvantages have been seen concerning the use of attorneys. Proponents for the use of attorneys have made the following arguments.

- Attorneys can overcome power imbalances between school districts and parents.
- Attorneys may help to facilitate agreements.
- Not allowing the use of attorneys may lead attorneys to counsel clients not to participate in mediation or to reject proposed agreements that they were not involved in.[40]

On the other hand, those who oppose the use of attorneys in mediation have made the following arguments.

- Attorneys maintain an adversarial posture during mediation, polarizing discussions, and making unreasonable demands.

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[37](...continued)
Children with Disabilities Under the IDEA," 53 Rutgers L. Rev. 333, 358-360 (2001).

[38] 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).

[39] 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.

[40] *Id.* This article contains a number of comments from state and local special education mediation directors. For example, the mediation director in Kentucky was described as arguing that attorneys give mediation a focus and are able to defuse tension. Other comments indicated that attorneys can help the parties determine reasonable expectations.

- Attorneys are not necessary to overcome power imbalances as mediators can protect the fairness of the process or parents could be trained to advocate for themselves.

- The use of attorneys can shift the emphasis of mediation from one to one discussions by the parties.[41]

Some states, while not prohibiting the use of attorneys in mediation, have limited their involvement to providing guidance prior to the mediation, providing telephone consultation during mediation, and reviewing the mediation agreement. This approach could arguably create a less adversarial atmosphere during mediation. However, it could also limit the ability of a lawyer to understand the dynamics of the mediation and how issues had been resolved.[42]

The CADRE article on the use of attorneys also noted several practices which they termed innovative. These included the practice in Wisconsin of training not only mediators but also all parties to mediation, including attorneys, and the practice in the state of Washington of privatizing the mediation office.[43]

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[41] *Id.*

[42] *Id.*

[43] *Id.*