

Helping Parents and School Districts Become More Effective Partners Special Education Mediation

What is Special Education Mediation?

Special education mediation is a voluntary process in which parents of students with disabilities and school district personnel meet with a specially trained, impartial individual (i.e., a mediator) to work out differences in a collaborative way. The school district must make mediation available to allow the parents and the school district to resolve disputes that may arise relating to the identification, evaluation, educational placement or the provision of a free appropriate public education (FAPE) to a student with a disability or a student suspected of having a disability. Because mediation is voluntary, both the school district and the parents must agree to participate in the process. The mediator, who is trained in effective mediation techniques, helps the participants listen to each other's views, and then assists in developing mutually satisfactory solutions. The goal of mediation is for both parties to find a workable solution to resolve their dispute. Mediation is arranged through the school district with a Community Dispute Resolution Center (CDRC). Using conflict resolution skills, mediators from the CDRC provide parents and school districts a confidential forum to:

- talk openly about differences;
- understand each other's concerns;
- clarify issues;
- find common ground;
- improve communication/rebuild trust;
- explore creative solutions; and
- reach a mutually agreeable solution.

Mediation sessions must be scheduled in a timely manner and held in a location that is convenient to both the school district and the parents. All conversations that occur during the mediation process are confidential, regardless of whether the parties resolve their dispute through mediation, and may not be used as evidence in any subsequent due process hearing or civil proceeding. If the parents and the school district resolve a dispute through the mediation process, they must execute a legally binding agreement that also includes a statement that all discussions held during the mediation process must remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The written, signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court in the United States.

What are the Benefits of Mediation?

Mediation is a highly effective process to resolve issues relating to special education. In 2014-2015, of those cases that proceeded to a mediation session in New York State, 88 percent resulted in agreement between parents and school districts. In mediation, the focus is on establishing collaboration and communication between the parties. Mediation allows the parties to discuss the issues and work together to develop a mutually agreeable solution. Because the parties have a direct role in resolving their own disputes, there may be greater commitment and ownership of the agreement. It may also result in greater satisfaction and improved relationships between the parties. In addition, mediation is provided at no cost to the parents and school district and can be a less adversarial and time consuming way of resolving disputes.

What Issues Can Be Mediated?

The mediation process can be used to address disputes related to the provision of a FAPE for a student with a disability. Issues in dispute that can be brought to mediation include, but are not limited to:

- Identification/Classification;
- Evaluation;
- Recommendation for special education services;
- Educational placement;
- Disciplinary actions for students with disabilities; and/or
- Other matters arising under federal and State special education law and regulations that may not be the subject of a due process hearing request.

What Issues Cannot Be Addressed in the Special Education Mediation Process?

Most issues can be addressed in the mediation process. The only issues which cannot be mediated are:

- Decisions made at the Subcommittee on Special Education level resulting in disagreement. These must first be referred in writing to the full Committee on Special Education (CSE) for attempted resolution;
- awarding of attorney's fees, even in conjunction with other points of agreement;
- parents' failure to respond to a request for, or refusal to consent to, the initial provision of special education programs and services;
- parental revocation of consent for receipt of special education services; and
- parents' refusal to consent, or failure to respond to a request to provide consent, to an initial evaluation or reevaluation of a student who is home-schooled or parentally placed in a private school at the parents' expense.

May Parents and School Districts Utilize the Mediation Process When the Parents are Seeking Tuition Reimbursement for a Parental Placement in a Private School?

Yes. Under section 300.148 of Title 34 of the Code of Federal Regulations, if the parents believe the school district did not provide FAPE to the student and places the student in a private school, the parents may utilize due process procedures, including mediation, to seek tuition reimbursement from the school district for the private school placement.

What is an Impartial Hearing and How Does it Differ from Mediation?

While the goal of both special education mediation and impartial hearings is to resolve disputes relating to the identification, evaluation and/or educational placement of the student, or the provision of FAPE, there are important differences between these processes:

- An impartial hearing is a more formal process in which a hearing officer presides and provides all parties the opportunity to present witnesses and testimony. During the impartial hearing, unless the parents and school district otherwise agree and except for expedited impartial hearings relating to disciplinary procedures, the student remains in his or her current placement (i.e., "pendency" or "stay-put"). The impartial hearing officer (IHO) provides written findings of fact and decision based upon the evidence submitted by the parties. The decision is binding unless an appeal is requested to the Office of

State Review. More information on impartial hearings can be found on the New York State Education Department's (NYSED's) website <http://www.p12.nysed.gov/specialed/dueprocess/home.html>.

- Mediation is a less formal process which allows the parties to discuss the issues and work together with a neutral party facilitating the discussion. The mediator, unlike the IHO, does not issue a decision but rather assists the parties to reach a mutually agreeable resolution to the problem and document that agreement in writing.

Can Mediation Be Requested Prior to a Request for An Impartial Hearing?

Yes. Mediation can be requested at any time including for matters arising prior to or at the same time as an impartial hearing request. Use of mediation to resolve a dispute cannot be used to deny or delay a parent's right to due process, such as the right to an impartial hearing.

If an impartial hearing is requested during mediation and more time is needed for mediation, a request can be made to the IHO to reschedule the impartial hearing. If a mediation agreement is not reached prior to the required initiation date of the impartial hearing, or if the parties inform the IHO that one of the parties has withdrawn from the mediation process, the impartial hearing process must proceed. An IHO may grant specific extensions of time beyond the decision due date upon a determination that a settlement is likely through the mediation process.

What is a Resolution Session and How Does the Process Differ from Mediation?

When an impartial hearing is requested by the parents, the school district must first convene a meeting with the parents and the relevant member or members of the CSE at which the school district has the opportunity to resolve the complaint. This meeting is called a resolution session. A resolution session gives the parents and the school district a chance to work together to reach a mutually agreeable solution. The resolution session is coordinated by the school district.

In both a resolution session and mediation, parents and the school district discuss the issues in dispute and have the opportunity to resolve the disagreement. In mediation, there will always be a trained neutral mediator present who is selected by the CDRC and who is experienced in conflict resolution and meeting facilitation. The mediator does not have a partiality to any party involved in the conflict; his/her role is to facilitate the discussion in order to assist the parties in negotiation. Although an agreement is ideal, the mediator does not influence either party in their decision-making process. Mediators assist the parties to develop and understand issues and options and negotiate in good faith. In mediation, conversations are confidential and cannot be used in any other proceeding as per federal and State special education regulations and in New York State (NYS) Judiciary Law Article 21-A. Both resolution session agreements and mediation agreements are binding and enforceable in court. Taking part in a mediation does not preclude either party from requesting a due process hearing. Additional information on the due process system can be found in the New York State Procedural Safeguards Notice available at <http://www.p12.nysed.gov/specialed/formsnotices/documents/ProceduralSafeguardsNotice.pdf>.

How Can Mediation Be Requested?

A written request for mediation must be submitted by the parents to the Committee on Preschool Special Education (CPSE), CSE or to the school district Board of Education (BOE). NYSED has developed a sample form to assist parents in describing disagreements and requesting mediation to resolve disputes. Use of the sample form is not required but will assist all parties to better understand the issues in dispute and the proposed resolution. The school district will immediately forward the request to the local CDRC. School districts may also request mediation by informing the parents that the school district is requesting mediation, providing the parents with all procedural safeguards, and requesting mediation through the CDRC. The optional form may be found at <http://www.p12.nysed.gov/specialed/formsnotices/mediation/mediationform.htm>.

What happens if the School Would Like to Pursue Mediation but the Parents are Hesitant?

Mediation is voluntary on both sides, as each party must be willing to attend a mediation session freely, in order to encourage discussion and collaboration. If the parents do not want to take part in the mediation process, the school district may ask the parents to take part in an informational session with a representative from the local CDRC who will encourage the use of mediation to resolve disagreements and explain the benefits of the process. If the parents choose not to participate in this meeting, the district may not deny or delay the parent's right to an impartial hearing.

Who Pays Mediation Costs?

Special education mediation is provided at no cost to the parents and the school district. The costs of mediation are the responsibility of NYSED. Attorney fees incurred by the parents or the school district must be paid for by the respective party. The school district is responsible for arranging and paying for the cost for an interpreter if one is needed.

The Mediation Process: What Happens After a Request is Made?

After the request for mediation is made in writing to the school district, it is immediately forwarded by the school district to the local CDRC. A CDRC staff member will then contact the parties to obtain additional information, answers any mediation-related questions, and arrange the scheduling of a mediation session at a location and time that is mutually convenient to both parties. This is usually at a site arranged by the local CDRC. Special education mediations are typically conducted during the day, and usually take place within two to three weeks of the request being received by the CDRC.

Where are the Mediation Centers and Who are the Mediators?

NYS law requires that special education mediations be conducted by a CDRC, serving each of the 62 counties in the State. Beginning in 1988, selected CDRCs expanded their services to include issues related to special education. Since July 1, 1995, all CDRCs have been required to provide special education mediation. These CDRCs are overseen by the NYS Unified Court System Office of Alternative Dispute Resolution (ADR) and Court Improvement. These centers are nonprofit, independent agencies that have over 10 years of experience in mediating special education. To determine the closest CDRC, please see <http://www.nycourts.gov/ip/adr/ProgramList.shtml>

Each CDRC has a roster of highly qualified mediators who are not employed by the school district or by NYSED. The mediators are volunteers with various occupations, and receive special training needed to facilitate the mediation process. CDRC mediators attend a basic training program in mediation, followed by an observation/apprenticeship program. With approval of the CDRC, a mediator may then be eligible to take an additional two-day training on special education laws and regulations to become a special education mediator. After another observation/apprenticeship period, these special education mediators are then permitted to mediate special education cases. Periodically, as laws and regulations change, mediators attend informational update trainings, in order to maintain their active status as special education mediators.

Who Must Attend the Mediation Session?

Both the parents and a representative of the school district attend the mediation session. The mediator will lead the mediation session and may discuss ground rules for participation. The main focus of the mediation process is to increase communication between the parties and find a workable solution, and to develop better ways to communicate in the future. The representative of the school district who attends the mediation session should be adequately informed and authorized by the school district to enter into an appropriate agreement on behalf of the school district.

Can Other People Attend a Mediation Session and What Are Their Roles?

State law and regulations do not address who may accompany a party at a mediation session. Either party may be accompanied by others or may consult with others before entering into a mediation agreement. Each party should enter the mediation process understanding and representing his or her rights and interests; however, there may be instances when a friend, family member, advocate or attorney is invited to provide advice and/or support. These invited individuals are, however, not the primary speakers at the mediation session and they are not the final decision makers. The parties represent themselves in discussions regardless of who accompanies them. The mediator will conduct the session with this in mind. At times, it may be appropriate for the student to attend a mediation session, particularly concerning transition services plans. This should be considered on a case by case basis, depending on the student's ability to understand and participate. If an interpreter is needed, the parents may decide to bring a friend or family member. The CDRC may have an interpreter on staff, or may be able to arrange for an interpreter from the court system. An outside interpreter may be brought in at the district's expense. The content of discussions held during a mediation session will remain confidential regardless of who attends.

Prior to a mediation session, the CDRC mediator will ask each party who, if anyone, will be accompanying them to the session, and will then inform the other party who those people are. CDRC staff may explore with participants the roles that everyone will play. A mediator may feel it necessary to define this further at the start of a session, and decide with the parties how the accompanying people can best serve the conversation.

What Happens at Mediation?

The mediation process starts with a neutral mediator explaining this confidential process. Each party then has an opportunity to speak and share their view of the situation. The ensuing conversation focuses on the student, and what is and what is not working with his/her educational program. Participants should be prepared to discuss what has brought them to mediation and the impact of the disagreement on the student. This is an opportunity to express concerns, not to “make a case”. Mediation is not about proving anything; it is about resolving differences and finding a workable solution.

A mediator will help participants problem solve. Problem solving in mediation involves all parties looking at possible ways to resolve the issues at hand. The mediation process encourages creativity and flexibility. A mediator will help the participants to arrive at an appropriate solution for all.

If and when an acceptable solution is found, the mediator will help the parties create an agreement for the participants to review and sign. Participants receive a copy of the agreement, which is binding on both parties.

If an agreement is not reached, and all agree that additional sessions will not resolve the dispute, the mediation case is closed. These issues can be discussed further with the CSE/CPSE or brought to an impartial hearing. The mediation session may have narrowed the issues that need to be resolved.

How Does One Prepare for Mediation?

The CDRC staff will talk to the participants involved about the mediation process and assist in preparation. The parents and school district should inform the CDRC of those expected to attend the mediation session.

The participants’ responsibilities are to:

- decide what the issues are in the conflict;
- have an authorized decision-maker for the school in attendance;
- be willing to listen to the other person’s point of view;
- be willing to discuss all issues;
- consider all possible solutions;
- work with the other participants to determine which solutions are most appropriate. In mediation, parties do not win or lose, but rather work to reach a mutually agreeable solution.

What Happens After Mediation?

Following mediation, any agreement reached is documented in writing, signed by both parties and subsequently implemented. If the written agreement reached by the parties is inconsistent with the student’s IEP then the student’s IEP must be immediately amended to be consistent with the mediation agreement. If an impartial hearing was scheduled, but all issues are resolved to the parties’ satisfaction, then the party that requested the impartial hearing should submit a written withdrawal of their due process request for an impartial hearing.

If an agreement is reached on some, but not all, of the issues in dispute, those issues which were agreed to are written in an agreement and all parties sign it. Any unresolved issues can be discussed further with the CPSE/CSE or taken to an impartial hearing.

Please note that if mediation does not result in an agreement and an impartial hearing is initiated, mediation discussions or materials may not be submitted at the hearing. Only written agreements may be presented as evidence. No summary of actual discussions or offers of settlement will be permitted, as they are covered under confidentiality guidelines.

What Happens if an Agreement is Reached, but One or Both Parties are Not Abiding by the Agreement?

A written, signed mediation agreement is legally binding and enforceable in any State court of competent jurisdiction or in a district court of the United States. If one or both parties are not abiding by the agreement, either party may wish to consult an attorney for more information. In addition, if the mediation agreement resulted in a change to the student's IEP, the parents could submit a written State complaint alleging that the IEP is not being implemented. For information on the State complaint process, see www.p12.nysed.gov/specialed/formsnotices/samplecomplaint.htm.