EFFECTIVE USE OF MEDIATION IN RESOLVING SPECIAL EDUCATION DISPUTES

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I. **Introduction.**

A. Mediation is a voluntary, problem-solving process in which a neutral third party assists the District and the parents in resolving special education disputes.

B. Mediation is the means by which most due process cases are resolved. Mediation has become increasingly useful in resolving state complaint proceedings and even disputes that have not yet resulted in the filing of a state complaint or due process hearing request.

II. **When May I Request Mediation through ODE?**

A. The District or the parent may request mediation any time there is a dispute regarding the student's special education.

B. Mediation may be requested before or after the filing of a due process hearing request. Once a hearing request is filed, the parties may agree to mediation in lieu of conducting a Resolution Session.

C. Mediation may be requested before or after a state complaint is filed.

III. **Why Should I Mediate?**

A. The involvement of a neutral third party who is trained and experienced in mediation techniques often results in an agreement that has eluded the parties in IEP meetings and previous negotiations.

B. Mediation is less time consuming than a due process hearing.

C. Mediation is less expensive than a due process hearing.

D. Mediation is less stressful than a due process hearing.

E. Mediation is less formal and less adversarial. It is a constructive, cooperative process. Participants in a mediation often find it to be a positive experience. This is seldom the case in a due process hearing.

F. Mediation gives the parents an opportunity to vent and "be heard" under controlled circumstances. This is often a cathartic experience that opens the door to serious negotiations and resolution.
G. Mediation is better able to preserve and even improve the ongoing working relationship between the parties. When a relationship between the District and parents is broken, mediation can turn that around and allow for a “fresh start.”

H. Mediation can help change unrealistic expectations.

I. Mediation allows self-determination. The parties are able to fashion their own solution through mutual problem-solving, rather than having one imposed on them by a judge or ODE.

J. Mediation is more flexible than a complaint proceeding or due process proceeding. It allows the parties to address matters that are beyond the jurisdiction of the Administrative Law Judge or ODE and agree on terms that would be beyond the relief available in a complaint or due process proceeding.

K. Mediation can address the needs and grievances of the District, as well as those of the parents.

L. Mediation can generally be scheduled much earlier than a complaint investigation or due process hearing. Thus, the issues can potentially be resolved much earlier, which is to everyone's benefit.

IV. If I Agree to Mediation, Will it Automatically Stay a Due Process Hearing or a Complaint Investigation?

A. No.

B. In a complaint proceeding, the parties may agree in writing to an extension of the usual timelines. In the absence of such an agreement, the investigation will continue on the usual schedule.

C. In a due process proceeding, the parties may agree to waive the usual timelines and ask the Administrative Law Judge to postpone further proceedings to allow the parties time to engage in mediation.

V. How is a Mediator Selected and Who Pays Them?

A. ODE provides the mediator and pays the mediator's fees and expenses.

B. ODE contracts with several qualified mediators to conduct special education mediations.

C. If the parties are able to agree on the selection of one of those mediators, ODE will usually assign that mediator if he or she is available.
D. Otherwise, ODE will provide each party with a list of three available mediators and ask each party to select two from the list. ODE will then assign a mediator who was selected by both parties.

VI. Who Should Participate in the Mediation?

A. Each party determines who will represent them at the mediation. Selection of the right participants is often critical to a successful outcome. The mediator will usually consult with each party regarding meeting participants.

B. At least one parent should attend. If there are two custodial parents, it is usually preferable to have both participate.

C. The student, particularly an older student, may participate. Younger students seldom participate in mediation, although they may attend briefly at the beginning of the session to provide their input.

D. A District representative with authority to commit resources and settle the dispute.

E. Someone familiar with the facts and the issues in dispute.

F. Someone who knows the student and the student's disability and needs well.

G. Someone familiar with the settlement options. For example, if placement is a part of the dispute, be sure the District's team includes someone who is knowledgeable about the placement options.

H. Someone who has good rapport with the family is a plus. By the same token, avoid including a staff member who has a contentious relationship with the parents or is prone to making inflammatory statements unless their presence is necessary or improving that particular relationship is an objective of the mediation.

I. Less is more. Try to limit the number of District participants to no more than three or four. Often, one person can fill two or more of the roles needed.

J. Someone who can think "outside the box."
VII. How Should I Prepare for Mediation?

A. Know the facts and issues well. Review the file. Consult with staff. Research the resolution options. Knowledge is power.

B. If the parents are represented by an attorney, talk to that attorney in advance to help narrow or focus issues, and potentially jumpstart negotiations. Compare notes to see if both sides have the same issues.

C. Prepare a summary of your positions and the support for each position.

D. Realistically evaluate the strengths and weaknesses of your case.

E. Determine what you want to accomplish in mediation. Make a list. Prioritize it. Remember that the mediation is not restricted to the issues raised by the parents in their complaint or hearing request.

F. Identify likely obstacles to resolution and develop strategies for overcoming them.

G. Identify options. What are you willing to offer? Think about the parents' goals. What do they need to accomplish? What are you able and willing to do that will meet those needs?

H. Develop an opening offer and a tentative bottom line.

I. Learn as much as you can about the mediator's style of conflict resolution.

J. Confer with the mediator by telephone regarding the process he or she follows, the issues in dispute, your view of the facts, the District's position on the issues, potential participants, obstacles to resolution, and mediation logistics.

K. Provide the mediator with copies of key documents related to the disputes.

L. Although preparation is essential, remember that mediation is a fluid, dynamic, unpredictable process. Be prepared to be flexible, creative, and spontaneous.

M. Mediation is strenuous and requires stamina. Get a good night's sleep. Eat a good breakfast.
VIII. What is the Mediator's Role?

A. The Mediator will:

1. Facilitate introductions and explain the process.

2. Present and explain the agreement to mediate, including the confidentiality requirements.

3. Explain and enforce ground rules.

4. Allow each party to make opening remarks or an opening statement.

5. Help the parties identify the issues to be resolved.

6. Help further refine issues that may be underlying, in order to move forward and reach resolution.

7. Establish the structure and procedure for the mediation, including whether it will be conducted in joint session, private caucuses, or both.

8. Facilitate the negotiations.

9. Convey offers and counteroffers between the parties.

10. Maintain the confidentiality of information disclosed in private caucuses unless the party expressly grants permission for disclosure.

11. Adjourn the mediation if resolution cannot be reached.

12. In most cases, prepare the written agreement if resolution is achieved.

B. The mediator may:

1. Suggest solutions not previously identified by the parties.

2. Comment, in private caucus, on the persuasiveness of a party's position or argument.

3. Ask for clarification of a party's offer.
4. Inform the parties as to whether they are close to a settlement or far apart.

5. Comment on how the other party is likely to react to a proposed offer.

C. The mediator will not:

1. Decide the case.

2. Take sides.


4. Force agreement where there is none.

IX. How Long Will it Take?

A. Most mediations take between half a day and a full day. Occasionally, it is necessary to schedule a second day of mediation.

B. Plan on devoting a full day to the mediation.

C. Take your calendar in case there is a need to schedule a second mediation session.

X. What are the Do's and Don’ts for Opening Statements?

A. Not all mediators ask for formal opening statements. Some, for example, may ask each participant to make a brief comment on what he or she would like to see as the outcome of the mediation.

B. When an opening statement is requested, the statement may be provided by the party, the party's attorney, or both. In most cases it is advisable for District staff members to at least participate in the opening statement.

C. Do:

1. Listen carefully to the parents' opening statement, paying attention to body language and every nuance of what they say and don't say.
2. Take careful notes of the parents' opening statement and positions, to better understand and resolve issues as the mediation unfolds.

3. Speak to the parents, and their attorney if they have one, not the mediator.

4. Make your opening remarks brief, positive in tone, and child-focused.

5. Acknowledge the legitimate concerns and good faith of the parents.

6. Express genuine concern for the student.

7. Demonstrate that you heard what the parents said in their opening statement.

8. Make your comments spontaneous and responsive to the parents' opening.

9. Confirm your willingness to be open-minded, flexible, and creative in seeking a mutually acceptable agreement.

10. Emphasize your commitment to negotiate in good faith.

D. Don't:

1. Be adversarial. It's mediation, not litigation. Avoid personal attacks, blame-laying, and inflammatory remarks that may torpedo the process before it gets started.

2. Engage in a point–counterpoint debate with the parents on every allegation they make in their opening. Politely correct material misstatements but save the rest of your rebuttal for later.

3. Declare that certain options are "off the table."

4. Interrupt the parents during their opening statement.

5. Use body language such as crossed arms that may inadvertently send an off-putting message to the parents.
XI. Will the Mediation be Conducted in Joint Session or Separate Caucuses?

A. It depends on the circumstances and the style of the mediator. Most mediations involve a combination of joint sessions and private caucuses.

B. Mediation is for the parties, not the mediator. Mediators are generally willing to adapt the format according to the wants and needs of the parties.

C. Either party may ask to meet privately, with or without the mediator, at any time. Common purposes for a private caucus include:

1. To discuss new information or proposals.
2. To re-evaluate your position.
3. To develop a proposal or counterproposal.
4. To speak with the mediator in private.
5. Respite.

XII. What Should I Tell the Mediator During Private Caucuses?

A. Present your view of the facts, with supporting evidence.

B. Discuss applicable legal principles, with supporting authorities.

C. Explain your position on each issue in dispute.

D. When making an offer, state the terms clearly, completely, and slowly, and ask the mediator to repeat them to ensure that the offer will be conveyed accurately.

E. If an offer from the parents is unclear, ask the mediator to obtain clarification from the parents.

F. As the negotiations progress, indicate which of your positions are firm and which are negotiable.

G. Let the mediator know that you are open to considering options the mediator may think of during the mediation. Invite more possibilities.

H. In most cases, avoid disclosing your "bottom line" unless the mediator asks for it.
I. If you have concerns about the parents' behavior in joint sessions, or how the mediation is progressing, discuss those openly with the mediator.

J. Clearly identify what information may be shared with the parents and what information should be kept confidential.

XIII. What Else Can I Do During Mediation to Optimize the Chances of a Successful Outcome?

A. Listen carefully.

B. Be flexible.

C. Be creative.

D. Be reasonable.

E. Be open to new ideas for resolution.

F. Be realistic. Expect compromise, but not capitulation. Neither party is going to get everything they want.

G. Adjust strategy and expectations as the process continues.

H. Be patient. Don't start with your best offer. Leave room for negotiation. Most mediations are a series of concessions as the parties move toward a compromise solution.

I. Don't give up. Progress may be slow at first. Significant movement often occurs late in the session. Hang in there.

XIV. What Should Be Included in the Mediation Agreement?

A. The names of the parties and the reason for the mediation.

B. A clear, concise statement of what each party agrees to do.

C. Timelines for completion of the agreed actions.

D. Agreement to dismiss any pending proceeding or, if none is pending, an agreement not to file one regarding issues resolved in mediation.

E. A release of claims.

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F. A hold-harmless clause if there are concerns that a third party may attempt to circumvent the agreement (e.g., custody issues, student approaching 18 years of age).

G. A provision regarding attorney fees, if fees are sought by the parents.

H. A provision regarding confidentiality.

I. Notice that the agreement is legally binding and enforceable.

J. A statement, if appropriate, that each party was represented by legal counsel during the mediation.

K. An agreement to re-enter mediation is a dispute arises regarding implementation of the mediation agreement.

XV. Will I Have to Pay the Parents' Attorney Fees?

A. In a complaint proceeding, no.

B. In a due process proceeding, probably. If the parents are represented by an attorney and the mediation results in a settlement of the due process proceeding, the terms will almost always include payment of the parents' reasonable attorney fees. The amount of the fees, however, is subject to negotiation.

C. If fees are included in the agreement, the District should request and review a redacted statement of the attorney's time and charges prior to actually sending any payment for attorney fees.

XVI. Will An Agreement Set a Precedent?

A. Generally speaking, no. The needs of each special education student are unique.

B. In some cases, however, there is a risk that the agreement, despite being confidential, will encourage other similarly situated parents to demand similar treatment.

XVII. Will the Agreement Be Confidential?

A. To a point. With a few exceptions, the discussions during the mediation and the terms of the agreement are confidential. However, the details of
the dispute may be known to nonparties and the outcome of the mediation may be obvious.

B. Under the confidentiality rule, the parents’ attorney may not disclose the results of the mediation to other similarly situated clients.

XVIII. Conclusion.

A. Particularly in due process proceedings, which have become increasingly expensive and inefficient, mediation has become the alternative of choice for resolving special education disputes.

B. Used effectively, and with appropriate preparation, mediation can resolve current disputes, address underlying issues that led to those disputes, and lay the groundwork for a more positive relationship between the parties in the future.