



south dakota
DEPARTMENT OF EDUCATION
Learning. Leadership. Service.

SOUTH DAKOTA SPECIAL EDUCATION PROGRAMS QUESTIONS AND ANSWERS ABOUT MEDIATION

Updated July 2011

Much of the following information is adapted primarily from a module within the *Building the Legacy* training curriculum on IDEA developed by NICHCY—specifically, [Module 18](#), *Options for Dispute Resolution*.

NICHCY – the National Dissemination Center for Children with Disabilities has excellent information on many topics as well as a superb set of training modules. You can find NICHCY at

<http://nichcy.org>

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What is mediation?

Mediation refers to a process conducted by a qualified and impartial mediator to resolve a disagreement between a parent and public agency. The Committee on Education and the Workforce, U.S. House of Representatives (2005), described mediation as follows:

Mediation is defined as an attempt to bring about a peaceful settlement or compromise between parties to a dispute through the objective intervention of a neutral party. Mediation is an opportunity for parents and school officials to sit down with an independent mediator and discuss a problem, issue, concern, or complaint in order to resolve the problem amicably without going to due process. (p. 13)

What are the benefits of using mediation to resolve a dispute?

While mediation cannot guarantee specific results, it can be an efficient and effective method of dispute resolution between the parents and the school district or, as appropriate, the SEA or other public agency.

As part of its technical assistance and dissemination (TA&D) network, OSEP has funded a center that specializes in dispute resolution, including mediation. It's called **CADRE**, the Center for Appropriate Dispute Resolution in Special Education, also known as the National Center On Dispute Resolution. CADRE is an excellent resource for the field. Check out CADRE's website at: www.directionservice.org/cadre

Through its work in dispute resolution, CADRE has identified a range of benefits of mediation for parents, educators, and services providers, including:

- Special education issues are complex and can best be solved by working together.
- Mediation often results in lowered financial and emotional costs, especially when compared to a due process hearing. It also tends to be faster and less adversarial.
- Given its voluntary nature and the ability of the parties to devise their own remedies, mediation often results in written agreements because parties have an increased commitment to, and ownership of, the agreement.
- Remedies are often individually tailored and contain workable solutions that are easier for the parties to implement since they have both been involved in developing the specific details of the implementation plan. Because the parties reach their own agreement, as opposed to having a third party decide the solution, they generally are more likely to follow through and comply with the terms of that agreement.
- Families can maintain an ongoing and positive relationship with the school and benefit from partnering with educators or service providers in developing their child's program.
- Research shows that people tend to follow the terms of their mediated agreements.

How often is mediation used to resolve disputes?

In South Dakota, mediation is used by both parties in due process hearings and complaints to try and solve disputes at a lower level. Mediation can also be requested without filing a state

complaint or a due process hearing. In 2010-2011 the following shows the use of mediation in the state:

Due Process Hearings	
• Total 2010-2011	3
• Total that went to mediation	1
State Complaints	
• Total 2010-2011	7
• Total that went to mediation	1
Mediations Requested Individually	
Total 2010-2011	2
Total Mediations for 2010-2011	4

When is mediation an option to resolve a dispute under IDEA?

IDEA requires states to ensure that mediation is available to resolve disputes. The availability of mediation has been expanded under the 2004 Amendments to IDEA. Now, **any** dispute, including matters that arise prior to the filing of a due process complaint, can be the subject of mediation.

When is mediation not available to resolve a dispute under IDEA?

The final Part B regulations make clear where mediation *cannot* be used: with respect to specific “consent override” situations.

First, a bit of context regarding “consent override.” This term refers to when public agencies (in other words, school systems) use IDEA’s procedural safeguards (including mediation under §300.506) to override a lack of parental consent.

When agencies can use their consent override procedures. Public agencies have the option of using consent override procedures (including mediation) to pursue the initial evaluation or reevaluation if parents of children who are enrolled in public school or seeking to enroll their child in public school:

- refuse consent to the initial evaluation or reevaluation; or
- fail to respond to a request to provide consent. [§300.300(a)(3) and (c)(1)(ii)]

Since IDEA makes use of these procedures optional, the decision whether to use these procedures is left to the discretion of the public agency. Note this is in reference to children enrolled in public school (or seeking to be enrolled there).

When agencies cannot use their consent override procedures. Consider the circumstance of a child who is home-schooled or who attends a private school in which the parents enrolled the child (as opposed to the school doing so). With these children, public agencies may not use their consent override procedures if parents:

- refuse consent to the initial evaluation or reevaluation; or
- fail to respond to a request to provide consent. [§300.300(d)(4)]

To reiterate: **Home-schooled children with disabilities. Parentally-placed private school children with disabilities. No consent override option.**

Here's another: **lack of parent consent for initial provision of special education and related services.** Parent consent is required before the school system may provide these services to a child for the first time, and the school system may not use IDEA's procedural safeguards, including mediation, to override the lack of consent if the parent:

- fails to respond to a request for consent; or
- refuses consent to the initial provision of special education and related services under Part B of IDEA. [§300.300(b)(3)]

What are the SEA's obligations for the mediation process?

The 2004 Amendments to IDEA require public agencies to establish and implement procedures to make mediation available to parents and public agencies to resolve a dispute involving any matter arising under Part B, including matters arising prior to the filing of a due process complaint.

The public agency's procedures for the mediation process must ensure that mediation:

- is voluntary on the part of both parties [§300.506(b)(1)(i)];
- may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B of IDEA [§300.506(b)(1)(ii)]; and
- is conducted by a qualified and impartial mediator who is trained in effective mediation techniques [§300.506(b)(1)(iii)].

The state must make sure that each mediation session is scheduled in a timely manner and held in a location that is convenient to the parties to the dispute [§300.506(b)(5)]. The SEA:

- is responsible for paying for the mediation process;
- is responsible for maintaining a list of qualified mediators who are knowledgeable about the laws and regulations relating to the provision of special education and related services; and
- must select mediators on a random, rotational, or other impartial basis. [§300.506(b)(2)—(4)]

Selecting mediators on an impartial basis would include permitting the parties involved in the dispute to agree on a mediator. (71 Fed. Reg. 46695)

The individual serving as the mediator must not be an employee of the SEA or the school district that is involved in the education or care of the child and cannot have a personal or professional interest that conflicts with his or her objectivity [§300.506(c)]. This is very important because it preserves the impartiality of the mediator's role. IDEA is very clear that the mediator is not an employee of the LEA or SEA solely because he or she is paid by the agency to serve as a mediator [§300.506(c)(2)]. This is so, even though the state is responsible for paying for costs associated with mediation, including the services of the mediator [§300.506(b)(4)].

IDEA permits a public agency to establish procedures to offer parents and schools choosing not to use mediation an opportunity to meet with a disinterested party who would encourage the use of mediation and explain its benefits [§300.506(b)(2)]. In other words, the regulations allow states to establish such procedures, but *do not require* them to do so (71 Fed. Reg. 46695).

In any case, neither the parent nor the school district can be required to participate in mediation.

What happens during the mediation process?

While each mediation situation is unique, generally both parties to the mediation will come to the mediation session prepared to explain their own position and listen and respond to the other party's position. The mediator will facilitate a discussion but does not "take sides" or give an opinion on the issues being disputed. The mediator works with the parties to help them express their views and positions and to understand each other's perspectives. The mediator helps the parties generate potential solutions and facilitates the parties' communication and negotiation.

If an agreement is reached to resolve the dispute, the mediator assists the parties in recording their agreement in a written, signed document.

The public agency must make sure that its representative participating in mediation has the authority to enter into a binding agreement on its behalf [§300.506(b)(6)(ii)]. A parent may choose to have a friend or advocate attend the mediation session. And, while there is nothing in the statute or the regulations that prohibit a parent or public agency from having an attorney attend, the presence of an attorney could contribute to a potentially adversarial atmosphere that may not necessarily be in the best interests of the child.

CADRE makes available a number of useful resources on participating in mediation, including:

suggestions on how to prepare for a mediation session

www.directionservice.org/cadre/preparing.cfm

sample "ground rules" for mediation

www.directionservice.org/cadre/grs.cfm

Can information shared during the mediation process be used later in due process hearings or civil proceedings?

No. IDEA requires discussions occurring during the mediation process to remain confidential. The regulations state:

(6) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that—

(i) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

(ii) Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

(7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States. Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part.[§300.506(b)(6) and (7)]

How is a mediation agreement enforced?

If the parties resolve the dispute through the mediation process, they must execute a legally binding agreement that states the resolution and is signed by both the parent and a representative of the agency who has authority to bind the agency. This is clearly stated at §300.506(b)(6) (just cited above). A written, signed mediation agreement is enforceable in any state court of competent jurisdiction (a court that has the authority under State law to hear this type of case) or in a district court of the United States.

Summarizing Mediation

Mediation provides a positive, less adversarial approach to resolving disputes between parents and school systems. With the assistance of a skilled and impartial facilitator (the mediator), the parties involved in the dispute are encouraged to communicate openly and respectfully about their differences and to come to an agreement. The decision-making power always resides with the participants in mediation.

Sample Mediation Request Form

 <p>south dakota DEPARTMENT OF EDUCATION Learning. Leadership. Service.</p> <p>800 Governors Drive MacKay Building Pierre, SD 57501-2294</p>	<p>Office of Education Services and Supports</p> <p>Special Education Programs</p> <p>http://doe.sd.gov/oess/specialed</p> <p>Mediation Request Form</p>
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I/We request mediation in the matter of _____ (child/student's initials) to try to reach an agreement on some or all of the issues regarding educational services for the child/student. I/We have read and understand the written materials describing mediation services and have been fully informed that the mediator is not providing the parent(s), the school district, or the child/student with legal representation. I/We also understand that the mediator is not providing counseling or therapy services.

I/We choose to pursue mediation to try to reach an agreement on some or all of the issues regarding the child/student's educational program. I/We understand that the mediation process will involve the mediator, acting as a neutral third party, to help develop an agreement that is mutually satisfactory. I/we understand the mediation is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

If an agreement is reached, I/we understand that the written and signed agreement may be shared with other individuals working with the child/student. I/We understand that discussions during the mediation session will be confidential and will not be used during subsequent proceedings pertaining to the child/student's case.

I/We understand the mediation process is voluntary on the part of both parties, it is not used to deny or delay a parent's right to a hearing or to deny any other rights afforded under Part B of the Individuals with Disabilities Act.

The following is a summary of the issue(s) that I/we will discuss in mediation: (use the back side of this sheet if more room is needed)

Please identify the other party(ies) involved in the mediation.

Name/ Involvement with Child	Contact Information

Parent(s)/Guardian(s) Name(s)	Child/Student Name	Date of Birth
Address		Telephone Number
Superintendent's Name		
School District Name/Address/Phone		
Signature of person requesting mediation		Date

Mail to:

South Dakota Department of Education

Ann Larsen, Director

Special Education Programs

800 Governors Dr.

Pierre, SD 57501-2294

Agreement to Mediate Form

AGREEMENT TO MEDIATE

Mediation Reference # _____

Student Name: _____

THIS DOCUMENT SHOULD BE READ BY THE PARTIES AND SIGNED AT THE BEGINNING OF THE MEDIATION SESSION

1. I understand that participation in mediation is voluntary and cannot be used to deny or delay a parent's right to a due process hearing.
2. I understand that an administrator, parent or guardian, or the mediator may stop the mediation at any time.
3. I understand that the mediator is here to help the parties see both sides, think about solutions, and write an agreement. The mediator is not serving as a legal representative, hearing officer, advocate, or counselor and will not make decisions regarding the educational placement or special education services to be provided to the student.
4. I understand that the mediator does not have to protect my interests and will not provide legal advice.
5. I understand that the mediator will not testify about the mediation in any subsequent proceedings and the mediator's records are not accessible to the parties.
6. I understand that discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.
7. I understand that any recording (electronic or otherwise) of a mediation session is not permitted, and that any notes taken during the session will be collected and destroyed. The only written record will be the agreement that we jointly develop and agree upon in the mediation process.
8. I understand that if the parties are able to reach a resolution in the mediation session, the agreement must be in writing and signed by both parties.
9. I understand that all parties must follow any written and signed agreement reached in mediation and that the signed mediation agreement is enforceable in any State court of competent jurisdiction or in a federal district court.
10. I understand that if I am unsure about my legal rights or how signing a mediation agreement may affect my rights, I may seek advice from an attorney or an advocate, but I also understand that neither an attorney or an advocate are required for a mediation.

LEA Authorized Representative's Signature

Date

Parent Signature

Parent Signature

Date

MEDIATION AGREEMENT

Mediation Reference # _____

Student Name: _____

LEA: _____

Date: _____

The parties are satisfied with the resolution and agree to abide by and fulfill the following terms:

ISSUE(S)/RESOLUTION

Issue 1:

Resolution:

Start Date: _____

This resolution will be incorporated into the Student's Individualized Education Program (IEP) at an IEP meeting to be held on or before:

Issue 2:

Resolution:

Start Date: _____

This resolution will be incorporated into the Student's Individualized Education Program (IEP) at an IEP meeting to be held on or before:

Issue 3:

Resolution:

Start Date: _____

This resolution will be incorporated into the Student's Individualized Education Program (IEP) at an IEP meeting to be held on or before:

Issue 4:

Resolution: _____ Start Date: _____

This resolution will be incorporated into the Student's Individualized Education Program (IEP) at an IEP meeting to be held on or before:

Please use additional pages, if necessary.

Implementation Contact Person: The parties have agreed the following individual(s) will be responsible for

(a) Coordinating and implementing the above stated resolution(s), and

(b) Serve as the point of contact:

Contact Person: _____

Phone Number: _____

Email Address: _____

Successful Mediation

Unsuccessful Mediation

LEA Authorized Representative's Signature

Date

Parent Signature

Date

Parent Signature

Date

Please fax or mail ALL signed documents to:

Ann Larsen, Director
Special Education Programs
800 Governors Drive
MacKay Building
Pierre, SD 57501-2294
Fax: 605-773-3782

Administrative Rules of South Dakota

CHAPTER 24:05:30

PROCEDURAL SAFEGUARDS

24:05:30:09. Mediation. Each school district shall ensure that procedures are established and implemented to allow parties to disputes involving any matter under this article, including matters arising before the filing of a due process complaint, to resolve disputes through a mediation process. Procedures for mediation are as follows:

(1) The district shall ensure that mediation is viewed as voluntary and freely agreed to by both parties and is in no way used to deny or delay an aggrieved party's right to a hearing on a parent's due process complaint, or to deny any other rights afforded under this article; and

(2) The mediation conference is an intervening, informal process conducted in a nonadversarial atmosphere that is scheduled in a timely manner and held in a location that is convenient to the parties in the dispute.

The state shall bear the cost of the mediation process, including the costs of meetings described in § 24:05:30:09.02.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

24:05:30:09.01. Mediator -- Qualified and impartial. The mediation process shall be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. The department shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. Mediators shall be selected on a random, rotational, or other impartial basis. An individual who serves as a mediator:

(1) May not be an employee of:

(a) Any school district or state agency that is involved in the education or care of the child; or

(b) The department, if the department is providing direct services to a child who is the subject of the mediation process; and

(2) May not have a personal or professional interest that conflicts with the person's objectivity.

A person who otherwise qualifies as a mediator is not an employee of a district or state agency solely because the person is paid by the department to serve as a mediator.

Source: 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

24:05:30:09.02. Meeting to encourage mediation. A school district may establish procedures to offer to parents and schools who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party:

(1) Who is under contract with a parent training and information center or community parent resource center in the state, or an appropriate alternative dispute resolution entity; and

(2) Who would explain the benefits of the mediation process and encourage the parents to use the process.

Source: 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

24:05:30:09.03. Mediation agreement. If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:

(1) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court; and

(2) Is signed by both the parent and a representative of the district who has the authority to bind the district.

A written, signed mediation agreement under this section is enforceable in any state court of competent jurisdiction or in a district court of the United States.

Source: 33 SDR 236, effective July 5, 2007.

