

## Advocate Participation in Washington Special Education Mediation

In Washington State, the special education mediation session is designed to be a problem-solving meeting. It offers both “parties” (parents, guardians, and school districts)<sup>i</sup> -- an “opportunity to resolve disputes and reach a mutually acceptable agreement concerning the identification, evaluation, educational placement or provision of FAPE [free and appropriate public education] to the student.”<sup>ii</sup> The assistance of a trained mediator enables parents and districts to address these topics in an environment that is conducive to working through disagreements and solving problems.

Many Special Education Mediations in Washington State take place without the presence of attorneys or other advocates. However, if both parties agree to it, advocates or attorneys can join.<sup>iii</sup> Advocates can play a role in supporting the participants before, during, and after the session. Listed below are key attributes of the process and how advocates can help maximize the chances that it will lead to mutually-satisfactory outcomes for parties.

In this process, the mediator’s role is **facilitative**, not **evaluative**.<sup>iv</sup> Advocates can help the mediator be effective by:

- understanding that the mediator’s job is to facilitate a conversation that is conducive to reaching voluntary agreements, not to dictate an outcome, or force agreements.<sup>v</sup>
- understanding that while the mediator is responsible for conducting the process,<sup>vi</sup> effective participation does not require “convincing the mediator” that your position is “right” and other positions are “wrong.”
- understanding that the mediator is not serving as a lawyer, advocate, or judge. As such, the mediator will not take sides, offer an opinion as to the strength of the legal case or the likelihood that an administrative or other judge will rule one way or another.<sup>vii</sup>
- assisting the parties with clarifying, any facts that may be misunderstood by, or unknown to, others at the table, while understanding that effective participation does not require “convincing the mediator” that your understanding of the facts is correct.

The process is **interest-based**, not **rights-based**. Advocates can help the process be successful by:

- focusing on the child’s educational needs, rather than on who’s right or wrong under the law (*and helping the parties do this, too*).<sup>viii</sup>
- focusing on solutions, not assigning blame (*and helping the parties do this, too*).
- focusing on the unique needs of the individual child, rather than on general concerns and systemic complaints (*and helping the parties do this, too*).
- focusing on the future, rather than repeatedly rehashing the past (*and helping the parties do this, too*). Of course there will be discussion about what happened prior to this point in time,

particularly in parties' opening remarks. However, the best use of the bulk of the time during the session is to spend it in a way that is problem-solving and future-oriented in nature: *We can't change the past, so where can we go from here?*

The process is **voluntary**, not **mandatory**.<sup>ix</sup> Advocates can help it be successful by:

- ensuring that parties understand what to expect and how the process compares to other choices they may have, so that their agreement to participate is voluntarily made in light of all of their options.<sup>x</sup>
- ensuring that before the session – or during the session should confusion become evident – that the parties are making agreements with an awareness of their legal rights and responsibilities. In the case of attorneys this assistance comes in the form of legal advice and counseling.<sup>xi</sup> In the case of other advocates it may come in the form of sharing written information, helping parties find on-line resources, or referring parties with questions to the OSPI website, OSPI staff, or counsel.
- ensuring that when parties agree to proposals, their agreement is voluntarily given.<sup>xii</sup>
- ensuring that when parties reach agreement, that the written language used to describe the terms of an agreement is clear, realistic, unambiguous, and accurately reflects the parties' intended resolution.

The process is designed to be **collaborative**, not **adversarial**. Advocates can help it be successful by:

- respecting that the mediators are experienced in the special education mediation process,<sup>xiii</sup> including having had specific training in the dynamics that maximize the chances of resolution.
- helping the parties understand that *collaboration* does *not* mean giving up, giving in, agreeing to any particular proposal, being forced to “compromise,” or being forced to reach agreement. It *does* mean working jointly, in good faith, towards the common goal of serving the child's best interests, and being willing to follow through on agreements.<sup>xiv</sup>
- helping prepare the parties to clearly express their concerns; that is, what brings them to the table.
- helping prepare the parties to advocate for themselves where possible. By definition, a collaborative process is *party-centered*. The expectation is that in most cases the parties will share their concerns and suggestions directly with each other and the mediator, since they best know the child and together can shape solutions specifically tailored to the child's needs. During the session, if parties need additional support in effectively articulating their concerns, advocates may meet with them privately or with the mediator (caucus).
- speaking in a way that is respectful and productive, and helping prepare the parties to do so. Collaboration is furthered when participants choose mutually-respectful language, refrain from attacks, and show a willingness to listen.

- understanding that an apology, should one be considered in advance or given at the table, is not an admission of wrong-doing.
- helping interpret technical documents.
- bringing an objective perspective to the table and helping diffuse tensions.
- bringing expertise to bear on whether expectations are realistic and whether proposals are feasible and practical.
- offering information, insights, experiences, questions, creative ideas, suggestions, and proposals that may provide momentum towards resolution. More important, helping empower the *parties* to make these contributions where possible.
- recognizing that parents and school districts generally have an interest in successfully working together. The child often remains in school in the district after the mediation is over, such that the parents and district (and especially the child) may be well served if they can reach agreement, resolve the dispute, and move forward.<sup>xv</sup>
- understanding that mediation is not a discovery “fishing” opportunity, and that the parties will be less candid and cooperative if they sense that this is what a lawyer is doing.<sup>xvi</sup>

Thank you for your participation in mediation. Please feel free to call Sound Options Mediation and Training Group or the Office of Superintendent of Public Instruction if we can be of assistance.

## Reference

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<sup>i</sup> The *parties* are the parents(s) or guardian(s) and the school district. The *participants* are the parties and everyone else who participates in the mediation session, including advocates and the mediator.

<sup>ii</sup> WAC 392-172A-05060(1).

<sup>iii</sup> Occasionally a party wishes access to an advocate during the mediation, but it is cost-prohibitive to have the advocate (particularly if an attorney) present the entire day. In those cases, parties may request periodic breaks during the session in order to confer by phone with their advocates. The process may also be flexible enough to accommodate other “partial participation” arrangements, such as presence in the room during only key parts of the conversation; participation via conference call; or review of tentative agreements after the session. That said, as experienced negotiators know, partial participation has built-in limitations that can thwart what might have been a good resolution: a cardinal rule of negotiations is to have the person with “authority” present at the table. The biggest limitation of partial participation is that someone is being asked to weigh in on issues without the benefit of having heard the full discussion of the facts, proposed solutions, pros and cons of those solutions, proposed alternatives, and pros and cons of the alternatives. An after-the-fact veto of what the parties thought would be a good or acceptable resolution can lead to distrust, delay, more conflict, and more costs. For these reasons, partial participation arrangements are not preferred. With these limitations in mind, advocates and parties need to decide the degree of participation appropriate to their situation. This topic also should be discussed during the pre-mediation conversations with the agency that administers the mediation program, Sound Options Mediation and Training Group (SOMTG), to ensure that the plan is acceptable to SOMTG, to OSPI, to other participants, and to the mediator.

<sup>iv</sup> A *facilitative* style or technique is one that “tends (or that the mediator intends) to help, or allow, the parties to find their own way and make their own choices based on their own understandings.” Leonard L. Riskin, “Decisionmaking in Mediation: The New Old Grid and the New New Grid System,” 79 NOTRE DAME L. REV.1, 19 (2003), available at: <http://scholarship.law.nd.edu/ndlr/vol79/iss1/1>. The mediator is likely to help the parties communicate, discuss interests, goals, and options, ask clarifying questions, and (particularly in caucus) ensure that both positive and negative potential consequences are examined. Using an *evaluative* style or technique, the mediator “includes a certain set of predictive or judgmental or directive behaviors ... that tend (or by which the mediator means) to direct (or influence or incline) the parties toward particular views of their problems, toward a particular outcome, or toward settlement in general.” Riskin, *supra*, at 18-19. The mediator is more likely to approach the dispute narrowly, that is, focusing on the parties’ legal positions, about which she may make recommendations or predict legal outcomes. For robust debate about the two styles, see, e.g., Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985 (1997); Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); Riskin, *infra*.

<sup>v</sup> See generally WAC 392-172A-05060(1) (mediators are “impartial”); WAC 392-172A-05065 (“impartial” and may not have a “personal or professional conflicts of interest.”). See also OSPI website (“neutral third parties and do not act as advocates for either parents or school districts”) (<http://www.k12.wa.us/SpecialEd/DisputeResolution/Mediation.aspx>, accessed on Dec. 15, 2015).

<sup>vi</sup> See WAC 392-172A-05065.

<sup>vii</sup> See n.6, above.

<sup>viii</sup> Where there is a need for a ruling on legal rights, that issue is not appropriate for special education mediation.

<sup>ix</sup> As a voluntary process, mediation requires the agreement of both parties. (WAC 392-172A-05060(2)). The mediation session may be ended by either party at any time. WAC 392-172A-05060(2). Mediation “cannot be used to deny or delay a parent’s right to a due process hearing ... or to deny any other rights ....” (WAC 392-172A-05060(3)). See also WAC 392-172A-05075(2) (district or other public agency may not deny or delay a parent’s right to a due process hearing if parent fails to participate in meeting to discuss mediation).

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<sup>x</sup> See, e.g., WA RPC 1.2, comment [5] (“...when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”)

<sup>xi</sup> See WA RPC, Preamble: A Lawyer’s Responsibilities [2] (“As a representative of clients, a lawyer performs various functions. As *advisory*, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.” (Emphasis added).

<sup>xii</sup> WA RPC 1.2(a) (lawyer “shall abide by a client’s decision whether to settle a matter”).

<sup>xiii</sup> See WAC 392-172A-05065.

<sup>xiv</sup> Mediation does not take away the right to ask for a due process hearing. See n.11, *supra*.

<sup>xv</sup> See, e.g., RPC 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”); *Id.*, Comment [2] (“Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.”)

<sup>xv.i</sup> See also, e.g. WA RPC, Preamble: A Lawyer’s Responsibilities [2] (“As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”); *Id.* [5] (“A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”); RPC 4.1 (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”); RPC 4.4(a) (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to ... delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”)