

MEDIATION HANDBOOK

Oregon Department of Education

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QUESTIONS AND ANSWERS ABOUT MEDIATION

1. *What is mediation?*

Mediation is for parents and educators who believe that they need a neutral third party to help solve differences about the education of a child with a disability.

Mediation is a way to resolve disputes about a child's special education evaluation, program or placement. It is an optional and voluntary process offered to parents and educators. A mediator provides the process by which the parents and educators can discuss issues and make decisions.

2. *What issues can be mediated?*

The parents and educators involved in the mediation decide what issues they want to resolve in mediation. Usually the issues discussed in mediation relate to the child's evaluation, eligibility, IEP, placement, discipline concerns, and/or transition. Mediation may also address communication issues that affect the working relationship of parents and educators.

3. *What are the outcomes of mediation?*

Mediation can produce the development of appropriate educational programs and services for children, resolution of disputes in a timely manner, improved communication, and the improvement of the relationship between parents and educators.

4. *Is mediation required?*

No. Mediation is voluntary. Parents, school districts, Early Intervention/Early Childhood Special Education (EI/ECSE) programs, or other public educational agencies may initiate a request. Mediation is offered by Oregon Department of Education (ODE) for disputes related to the education of a child with a disability.

5. *What are the advantages of mediation?*

Mediation offers an informal, effective way for parents and educators to resolve their differences. Mediation is:

- Effective in improving relationships between educators and parents.
- Less expensive than other options.
- Designed for mutual problem solving.
- Less stressful than formal proceedings.
- Less time consuming than other options.

6. *Who may request mediation?*

A child's parents, legal guardian, surrogate parent, a school district, EI/ECSE program or public agency may request mediation. An adult student, 18 years or older, may also request mediation.

7. *When can you ask for mediation?*

Mediation may be requested at any time a parent or an educator has an interest in resolving issues related to a child's special education. Typically, parents and district may request mediation if there is an impasse related to a certain aspect of a child's

education. Mediation may also be requested before or at the same time as a due process hearing request or the filing of a complaint.

8. How do you request mediation?

Parents or educators may contact ODE to ask for mediation. Upon completion of the request form, their request to mediate will be conveyed to the other party involved. When the parents and educators agree to mediate, ODE will assist the parties in the selection of a mediator.

The form to request mediation is included in Appendix B of this document. Parent, school districts, EI/ECSE programs and other agencies may also request mediation by contacting the ODE Legal Specialist at 503-947-5797.

9. How are mediators selected?

ODE maintains a roster of impartial contracted mediators. ODE considers the following factors when making mediator assignments: mediator availability to complete work within required timeline; geographic proximity; equitable rotation within the roster; and input from the parties. To obtain party input, ODE submits a list of three mediators with a brief statement of their qualifications to both parties. Each party is asked to identify two mediators of choice from the list. When feasible, ODE assigns the mediator that is mutually selected by the parties. ODE reserves the right to make the final mediator appointment based on the need for equitable rotation, capacity building, and/or to avoid any real or perceived conflict of interest pertaining to mediator impartiality. ODE may choose to assign co-mediators to a case based on any of these factors.

10. Are the mediators impartial?

Yes. The Individuals with Disabilities Education Act (IDEA) and state law prohibit the selection of any mediator employed by a school district, EI/ECSE program or a state agency that is involved in the education or direct care of the child. In addition, mediators “must not have a personal or professional interest that conflicts with the person’s objectivity”.

11. What happens after the mediator is selected?

The selected mediator contacts the parties by telephone to share, discuss and determine the following:

- ❑ The role of the mediator, and his/her contact information;
- ❑ The structure and purpose of the mediation session;
- ❑ Who may attend the mediation session;
- ❑ The time required for the session; and
- ❑ The location for the mediation session (school districts or EI/ECSE programs are asked to make arrangement for the mediation session to be held at a neutral site, i.e., library, public utility building, etc.)

After talking to the parents and school district or EI/ECSE program, the mediator determines the preferred date, time, and location for the mediation and communicates the determination to each party.

The school district or EI/ECSE program and the parents confirm the arrangements and

whether a translator or interpreter is needed because of limited English proficiency or a hearing impairment. If the parents cannot be reached by phone, the mediator will send a letter, which includes all of the information that would have been covered by phone.

12. *How soon is mediation scheduled?*

Mediation is usually scheduled within two to three weeks of parents and educators notifying ODE of their agreement to mediate.

13. *May participants bring other persons to the mediation session?*

Yes. Parents or educators may bring other persons who may help them, but to keep the session informal and manageable, the number of additional persons should be kept to a minimum. As a general rule not more than 3-4 participants per district or program and family should participate. The participants should include persons with direct knowledge of and authority to make decisions about the child. School district or EI/ECSE program participants must include someone who has the authority to commit school district/program resources to the agreement.

14. *Who decides who will participate?*

Parents or adult students (18 years or older) determine who will represent the student and family, and school districts determine who will represent the school, district or program. If there is disagreement about who will participate, the mediator will decide how the matter will be handled.

15. *Can the student participate?*

Yes. In the case of older students, their participation is welcomed and can be helpful reaching agreements. Adult students should always participate. The participation of younger students should be considered on a case-by-case basis.

16. *Can advocates and/or attorneys participate?*

Yes. Sometimes, advocates and attorneys can be helpful in assisting the parties in developing offers, finding solutions and ultimately, in writing the agreement with the mediator. Mediation is a problem-solving process in which both parties desire a solution.

17. *What about the child's placement pending mediation?*

A mediation request does not change or preserve a child's placement status. Mediation does not, by itself, result in a "stay put" determination. The child's IEP/placement team determines the child's services and placement.

18. *How long is a mediation session?*

In general, a mediation session may last a full day. Mediation may be shorter or longer, depending on the complexity of the dispute. In some cases, mediation sessions have been successfully completed in half a day. The mediator may decide to schedule more than one mediation session if requested by the participants or if the mediator believes more sessions may be helpful. Recent data shows that mediations average four to five hours in length.

19. What is the role of the mediator?

The mediator's role is to structure and facilitate the mediation. They may help the parents and educators consider and develop alternatives to the dispute. The mediator may generate suggestions for both parties to consider, but unless the parties agree on these suggestions, the mediator will not push for their acceptance.

20. What happens if you reach an agreement in mediation?

The mediator, with the help of the parties, puts the agreement in writing. The participants usually sign this agreement before the mediation session is concluded.

21. What is usually included in a mediated agreement?

Agreements may include:

- ❑ actions to be taken by each party;
- ❑ timelines for implementation of the agreement;
- ❑ responsibilities of each party to implement;
- ❑ agreement to dismiss complaint or due process hearing, if one exists;
- ❑ agreement to confidentiality of discussion;
- ❑ what will happen if one of the parties believes that the other is not implementing the agreement; and
- ❑ notice that the agreement is a legally binding document and is enforceable in any State court of competent jurisdiction or in a district court of the United States.

22. Who receives a copy of the agreement?

The parents and school district or program each receive a copy of the written agreement. A copy of the agreement is usually placed in the child's educational file if the issues decided in mediation relate to an aspect of a child's special education. A mediation agreement is an education record if it includes educational information directly related to a child. School districts and EI/ECSE programs must maintain the mediation agreement as education record information.

The parties may also agree to forward a copy to the Oregon Department of Education (ODE) for the purpose of evaluating the effectiveness of the mediation system and identifying areas for program improvement.

23. What happens if an agreement is not reached?

If the parties are unable to reach agreement, the participants may consider other dispute resolution options. These might include: independent educational evaluation; local alternative dispute resolution; local complaint or grievance procedure; complaint resolution procedures; and due process hearing. In some cases, another mediation session may be scheduled if the mediator determines that progress may be achieved in another session.

24. If I am uncomfortable talking about my concerns in the joint session, can I ask for a private meeting with the mediator?

Yes. Mediators may hold private meetings or caucuses with the parties during mediation. Participants can ask for a private meeting with the mediator at any time. A private meeting may be used when people: **(1)** Have questions or concerns about the mediation process; **(2)** experience frustration in response to comments or actions of

others; **(3)** have personal feelings that affect their participation; or **(4)** want to share information or an idea for resolution privately.

25. *Who pays for mediation?*

The Oregon Department of Education (ODE) contracts with mediators and pays for the mediation session.

26. *What are the mediators' qualifications and training?*

Mediators have a diverse background of training and experiences. The mediator group includes: college professors, mediators in neighborhood/community organizations, mediators in private practice and attorneys. All mediators:

- ❑ Have a minimum of a Bachelor's Degree from an accredited university;
- ❑ Have completed a mediation training/preparation program;
- ❑ Have knowledge of the IDEA and other state and federal laws related to children with disabilities; and
- ❑ Have experienced and demonstrated effective conflict resolution and mediation skills, problem-solving approaches, communication skills, and interpersonal relationships.

ODE conducts training sessions with its contracted group of mediators to enhance their mediation skills and abilities and to provide current information on legal developments related to special education.

27. *What do the mediators actually do?*

Following their selection, the mediators contact the parties to set up the time, place and plan the details of the mediation session. The mediators structure the session and facilitate the party's discussion of the issues and potential solutions. They help parties in dispute move from a point of impasse to a point of resolution through the use of diverse strategies. Because there is no one method to resolve problems associated with special education, mediators are flexible in approaching each new problem and the different needs within each group.

28. *Does mediation automatically delay or postpone a due process hearing or complaint resolution process?*

No. Mediation can occur before a hearing or complaint investigation, but cannot automatically delay or deny the hearing or the investigation. Parties may agree to extensions of the complaint investigation timelines to participate in mediation. If the parties are involved in a due process hearing, they may agree to waive the mandatory resolution meeting and proceed to mediation.

29. *Are discussions in mediation confidential?*

Yes. There are a variety of federal and state laws that provide for the confidentiality of mediation discussions. These are outlined in the "Agreement to Mediate", in Appendix A of this document.

THE ROLES OF THE PARTIES INVOLVED IN MEDIATION

The mediator is a neutral party working to resolve a dispute. In fulfilling this role, the mediator will approach the dispute free of bias, treating both sides with respect. The right to disagree courteously and with regard for others will be encouraged.

The mediator will:

- ❑ Explain his/her roles as a facilitator to assist parents and educators to reach an agreement.
- ❑ Review the information in the Agreement to Mediate (see page 11 of this document), ground rules, and confidentiality requirements.
- ❑ Conduct the mediation.
- ❑ Listen to each party's perspective of the dispute.
- ❑ Review records and documents as necessary.
- ❑ Help to identify the issues to be mediated.
- ❑ Seek statements from each party as to their position or points of disagreement, requesting clarification as necessary.
- ❑ Emphasize the present aspects of the case, limiting discussion of the past to that which is necessary for understanding and planning for the future.
- ❑ Meet separately (caucus) with each party, if needed, and keep discussion confidential.
- ❑ Be helpful to both parties, make suggestions, and outline areas of agreement.

At the conclusion of the mediation session, the mediator will do one of the following:

- ❑ Write a clear, concise agreement to be signed by participants.
- ❑ Terminate the session if it becomes evident that an agreement cannot be reached.
- ❑ Schedule another mediation session with the agreement of the parties.

The parents and school district will:

- ❑ Approach the mediation in good faith with the intent of reaching an agreement.
- ❑ Acknowledge and honor the ground rules for mediation and the confidentiality of discussions in mediation and complete the Agreement to Mediate.
- ❑ Present their perspective, including all relevant information.
- ❑ Ask for clarification whenever material or a point of discussion is not understood.
- ❑ Be active participants in the session and in the designing of the mediation agreement.
- ❑ Be available for the time that mediation is scheduled.
- ❑ Try to understand the nature of the dispute and address the need for future problem solving steps or procedures.
- ❑ Implement the agreement reached during mediation.

The Oregon Department of Education will:

- ❑ Pay the costs for mediation when the parties agree to mediate a special education dispute.
- ❑ Maintain a list of qualified mediators.
- ❑ Provide training to mediators on special education law and effective mediation process.
- ❑ Provide a procedure for the parties to select a mediator.

- ❑ Evaluate and improve special educational mediation services by sending surveys to the participants, compiling and considering the results.
- ❑ Arrange for contact with other parents who can provide information about the use and benefits of mediation when they have questions about whether or not they want to participate in mediation.

Early Intervention/Early Childhood Special Education (EI/ECSE):

While ODE has the same requirements for EI/ECSE with regards to mediation as it does for public school, there is a notable difference. For public school, ODE is the State Educational Agency (SEA) and the individual School Districts are the Local Education Agencies (LEA) for their respective areas.

For EI/ECSE, ODE serves a dual capacity of being the SEA and the LEA. ODE is responsible for the provision of EI/ECSE services and implements this by contracting with ESD programs to deliver services. This dual role results in ODE ultimately bearing the same responsibilities of an LEA in the mediation process. However, all mediators are independent contractors and are impartial to either party in mediation.

PREPARING FOR MEDIATION

While you are waiting for mediation, it may be helpful to:

1. Make an outline of your viewpoint of the dispute:
 - ❑ What's involved?
 - ❑ What are you in disagreement about?
2. List the solutions you would be willing to offer to settle the dispute. You may want to list the most important one first, next important second, and so on.
3. Check out your viewpoint and ideas: Ask others (friends, relatives) to react and comment on your views, what you are seeking, proposed solutions, etc.
4. Decide what values, interests and beliefs are connected to this dispute.
5. Decide if you need someone to assist you (attorney, advocate, consultant, etc.) in reaching an agreement. If you think it will be difficult to mediate by yourself, seek an advisor who will represent your interests, and work toward an agreement. Select someone who understands that this is a problem-solving process, not an adversarial procedure.
6. Think about both short-term and long-range solutions. Some of the issues might be addressed on a short-term basis for a "trial" period to test a proposed solution. Maybe a longer period is needed to decide if the solution is workable. Some of the solutions can be modified after they have been tested.
7. Negotiate with the attitude that, in developing an agreement, it is frequently advisable to start with a plan that might work (even though not your first choice) and then build on it or modify it as needed, rather than to adhere to a single

solution that is unacceptable to the other party.

8. Recognize that mediation requires the give-and-take of ideas and offers before solutions are agreed to and an agreement reached. Therefore, mediation can be a very creative, spontaneous, and dynamic process for the participants.
9. Remember to keep the focus on the child's needs.

THE MEDIATION SESSION

Stage I: Preliminary Stage

The preliminary stage begins before the arrival of the participants, with the mediator making sure that the arrangement of the room facilitates communication.

As participants arrive, the mediator typically introduces him/herself and indicates where the participants are to sit. Once everyone is seated, the mediator introduces each individual by name and title.

The mediator works to establish a climate conducive to joint decision making. The mediator reviews the purpose of mediation and the procedures that will be used during the session. This review typically includes:

- ❑ Brief discussion of the Agreement to Mediate, ground rules and the confidentiality requirements for mediation.
- ❑ An explanation of the mediator's role.
- ❑ A statement about mediation within the context of the due process hearing and complaint investigation procedure, if applicable.
- ❑ A statement indicating that the focus of the discussion will be limited to the present situation and the facts necessary to work toward its solution.

In addition, the mediator explains that it may be necessary to **recess or caucus**.

A **recess** allows participants a chance to think about what has occurred and what solutions might be agreeable to them and offers a break in the proceedings.

A **caucus** refers to a private meeting between the mediator and each of the parties. It is used to help determine the true issues and positions of the parties, the parties' "bottom lines," and what alternatives are being considered to the proposed plan. Parties may want to share confidential information with the mediator. They should be assured that this information will not be shared without their consent.

Stage II: Discussion

This stage begins with the mediator allowing both parties to briefly make a statement about the problem(s) or issue(s).

During the discussion period, the mediator will:

- ❑ Encourage full, active participation of both parties.
- ❑ Clarify and summarize statements that may be misinterpreted or not understood.
- ❑ Prevent either party from monopolizing discussion.
- ❑ Provide periodic summaries of the discussion.
- ❑ Call a recess or caucus when appropriate.
- ❑ Assist in exploring alternatives.
- ❑

Stage III: Closure

This stage begins when the parties have agreed the mediation session should be ended. If there is agreement, the mediator verbally summarizes the agreement(s) and puts the agreement in writing.

The agreement:

- ❑ Indicates who will be responsible for implementation.
- ❑ Specifies the time frames for implementation.
- ❑ Indicates what action is expected of each individual.
- ❑ States procedures to follow if implementation does not proceed as planned.

The parties sign the agreement.

If there is not agreement, the mediator will determine:

- ❑ Whether to recess the session and reschedule another.
- ❑ Whether to terminate the session and inform the parties of other resolution options.

APPENDIX A

AGREEMENT TO MEDIATE

The parties _____ and the _____ (agency) agree to mediate their dispute over the education of _____ (student) in accordance with the following terms: `

Nature of Mediation:

- Mediation is a collaborative process in which an impartial mediator guides the parties' communications to assist them to reach a mutually acceptable agreement.
- The mediator does not have the authority to decide any disputed issue.
- The parties understand that their participation in mediation is voluntary and a party may withdraw from mediation at any time.
- The mediator may end the mediation if the parties reach an impasse, if s/he cannot maintain impartiality, or if s/he determines that s/he can no longer effectively move the parties towards resolution.
- The parties, with the mediator's assistance, determine the scope of the mediation.

Role of Mediator:

- The parties agree that _____ will be the mediator.
- The mediator is an independent contractor hired by the Oregon Department of Education (ODE).
- The parties understand that the mediator is not acting as an advocate, does not represent any of the parties and cannot give legal advice to any party.
- *(Optional alternative, if attorney-mediator: The parties understand that although the mediator is a member of the Oregon State Bar, the mediator is not acting as an attorney or advocate, does not represent any of the parties and cannot give legal advice to any party.*

Role of the Parties:

- The parties will mediate in good faith with the intent of reaching an agreement.
- The parties will make decisions about ideas and options presented during the course of the mediation session.

Fees and Expenses:

The mediator's fee and expenses are paid by the ODE.

Confidentiality of Mediation Communications:

Mediation communications means all communications that are made in connection with mediation, to a mediator, to a party, or to any other person present at the mediation.

Mediation communication also includes documents and other materials, including any draft mediation agreements, which are prepared for or submitted in connection with a mediation by a mediator, a party, or any other person present at the mediation.

Under federal and state law, mediation communications are confidential and may not be used as evidence in any later legal proceeding. The ODE has provided each party with a Mediation Handbook that includes a copy of Oregon Administrative Rules 581-015-2335 and 581-001-0110 detailing these and other exceptions.

- The mediator and the participants will not tell others the content of discussions that occur during the mediation. This includes statements during the mediation process, both before and during the mediation session.
- The mediator or other participants in the mediation may have obligations under state or federal law to report abuse, threats of physical harm or professional conduct affecting licensure.
- The mediator may hold a separate, private meeting (caucus) with any party. Information revealed in caucus is confidential and will not be disclosed by the mediator to other parties without authorization.
- A stenographic, video or audio tape record may not be made of any mediation session.
- Any notes taken by the mediator are confidential mediation communications, are property of the mediator and will not be shared with any one.
- Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.
- The parties and their attorneys will not call the mediator as a witness in any future legal proceeding. The parties and their attorneys will not subpoena the mediator or demand any records, notes or work products of the mediator in any future legal proceeding. If either party subpoenas the mediator or the mediator's records, the mediator will move to remove the subpoena with the support of the ODE. The party making the demand agrees to reimburse the mediator for all expenses incurred, including attorney fees, plus the mediator's then hourly rate for all time taken by the matter.
- *(If the parties are represented, the disclosure to the mediator of information covered by the attorney-client privilege does not waive the privilege)*

Written Agreement:

If the parties reach an agreement, the mediator, with the help of the parties, puts the agreement in writing. Under the Family Education Rights and Privacy Act (FERPA), school districts/agencies must maintain the confidentiality of student specific information in the mediation agreement. Non-student specific information in the mediation

agreement is not considered confidential.

If there is a written, signed agreement between the parties to resolve the dispute, the agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States, 34 CFR 300.506 (b) (7).

Consultation with Counsel:

The parties understand that mediation is not a substitute for legal advice. They may seek independent legal assistance throughout the mediation process and before signing a mediated agreement.

I have read, understand and agree to the provisions of this Agreement to Mediate:

Signature: _____ Date: _____

I understand that ODE will forward my request to the other party involved and if they agree to pursue mediation, ODE will contact me and make arrangements for mediation.

Signed: _____ Date: _____

(For parents): I authorize the school district and ODE to share educational information with the mediator about my child's identity, educational needs, and information pertinent to the mediation. I understand the mediator will keep this information confidential.

Parent signature: _____ Date: _____

Requests for mediation may be submitted to ODE

by: E-mail:

ode.disputeresolution@ode.oregon.gov

Mail: Oregon Department of Education
Special Education Legal Specialist
Office of Student Services
255 Capitol St., NE
Salem, OR 97310

or Fax: 503-378-5156

APPENDIX C

Administrative Rules for Special Education Mediation

581-015-2335 Mediation

- (1) The Department offers mediation at no cost to the parties to resolve special education disputes, including matters arising before the filing of a complaint or hearing request.
- (2) Mediation:
 - (a) Must be voluntary on the part of the parties;
 - (b) Must not be used to deny or delay a parent's right to a due process hearing under OAR 581-015-2345, a complaint under OAR 581-015-2030 or other procedural safeguards; and
 - (c) Must be conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
- (3) The Department maintains a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. The parties to mediation participate in the selection of the mediator. Mediators are selected from the list on a random, rotational, or other impartial basis.
- (4) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.
- (5) An agreement reached by the parties to the dispute in the mediation process must be set forth in a legally binding written mediation agreement. The written agreement must:
 - (a) State the terms of the agreement;
 - (b) State 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
 - (c) Be signed by the parent and a representative of the school district who has the authority to bind the district.
- (6) The mediation agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States.
- (7) Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.
- (8) Notwithstanding subsection (6), a mediation communication is not confidential if it relates to child or elder abuse and is made to a person who is required to report abuse, or threats of physical harm, or professional conduct affecting licensure.
- (9) An individual who serves as a mediator:
 - (a) May not be an employee of:
 - (A) Any school district;
 - (B) The Department of Corrections;
 - (C) The Department of Education; and
 - (b) Must not have a personal or professional interest that conflicts with the person's objectivity.
- (10) A person who otherwise qualifies as a mediator is not an employee under subsection (9)(a) of this rule solely because he or she is paid by the Department to serve as a mediator.
- (11) The Department may request parents who are reluctant to use the mediation process to meet with a neutral party who would explain the benefits of the mediation process and encourage the parents to use the process. This meeting shall occur at a time and location convenient to the parents and at no cost to the parents. The Department or school district may not deny or delay a parent's right to a due process hearing if the parent fails to participate in this meeting.

Stat.: Auth.: ORS 343.055; ORS 343.155

Stats.: Implemented: ORS 343.155, 34 CFR 300.506

581-001-0110 Confidentiality and Inadmissibility of Mediation Communications

- (1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.
- (2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a

public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Mediations Excluded. Sections (6)-(10) of this rule do not apply to:

- (a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or
- (b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters;
- (c) Mediation in which the only parties are public bodies;
- (d) Mediation involving two or more public bodies and a private party if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential;
- (e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

All the parties to the mediation and the mediator agree in writing to the disclosure; or

The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c)-(d), (j)-(l) or (o)-(p) of section (9) of this rule.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8)-(9) of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding.

(8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, that the mediation communications in the mediation will be confidential and/or nondiscoverable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an authorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must be in substantially the following form. This form may be used separately or incorporated into an "agreement to mediate." [Form not included. See ED. NOTE.]

(9) Exceptions to confidentiality and inadmissibility.

- (a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.
- (b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.
- (c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

- (d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.
- (e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.
- (f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.
- (g) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.
- (h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.
- (i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.
- (j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.
- (k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:
 - (A) a request for mediation, or
 - (B) a communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation, or
 - (C) a final offer submitted by the parties to the mediator pursuant to ORS 243.712, or
 - (D) a strike notice submitted to the Employment Relations Board.
- (l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.
- (m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:
 - (A) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege, or
 - (B) Attorney work product prepared in anticipation of litigation or for trial, or Prepared

exclusively for the mediator or in a caucus session and not given to another party in the mediation other than a state agency, or

- (C) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation, or
 - (D) Settlement concepts or proposals, shared with the mediator or other parties.
- (n) A mediation communication made to the agency may be disclosed and may be admitted into evidence to the extent the State Superintendent, Associate Superintendent or designee determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.
 - (o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 30.402 or state or federal law requires the terms to be confidential.
 - (p) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).
- (10) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

[ED. NOTE: The form(s) referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

StatS.. Auth. ORS 36.224

Stats. Implemented: ORS 36.224, ORS 36.228, ORS 36.230, ORS 36.232

Hist.: ODE 7-2001, f. & cert. ef. 1-29-01

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