

Frequently Asked Questions About Legal Aspects of Mediated Agreements In Special Education Disputes

Mediators are neutrals that assist the parties in special education disputes to reach their own mutually acceptable resolutions. Mediators do not have authority to decide any disputed issue, and they cannot represent, advocate for or give legal advice to any party. Mediators encourage each party to seek independent legal advice and/or assistance throughout the mediation process. Independent legal advice might focus on the party's legal needs, rights or obligations in the specific disputed situation. Advice might also be sought about the legal status of mediation and the impact of a mediated agreement.

The following general information about various legal aspects of the mediation process and mediated agreements might help the parties to special education disputes seek guidance from legal advisors:

1. While trying mediation, can the parties extend the timelines for a pending Due Process Hearing?

If a Due Process Hearing has been requested, the law sets very specific timelines for such procedural matters as when documents must be exchanged and when the hearing officer must issue a decision. Mediation must not delay a parent's right to a due process hearing, so typically the mediator and parties work to complete the mediation process in time to allow the parties to move on in a timely manner should a hearing still be necessary. The parties, jointly or unilaterally, would need to present to the assigned Hearing Officer any requests for an extension in pertinent hearing timelines. Typically, a Hearing Officer is more likely to grant a joint request.

2. How do we implement our Mediated Agreement?

Once the parties reach agreement, they are usually very invested in its smooth implementation. The parties should think through the best ways to implement the terms of their agreement, anticipating possible impediments and planning for them.

Some terms may be within the parties' control, such as changing how they communicate with each other or reimbursing certain expenses.

Other decisions may belong to the student's IEP Team. The participants in a mediation may include all the required members of the Team. If so, they could take Team action on the spot. Otherwise, the most the parties can commit to are procedural steps (such as when the district will convene a Team meeting and who will attend) and joint recommendations to the Team (such as, the parties agreeing to jointly recommend to the Team that it change the student's placement to a regular classroom with specified supports).

If the parties agree to ask the Team to ratify the agreement or incorporate it into the IEP, then the procedural safeguards that help ensure accountability for implementation of an IEP might aid its implementation.

3. How do we enforce our Mediated Agreement if the other party doesn't comply?

The parties' hard work in crafting a mutually acceptable resolution will likely pay off in compliance with its terms. Typically, people follow through with commitments they have voluntarily made. Enforcement actions over mediated agreements are rare. Enforcement problems more often arise with administrative or court orders that are imposed on the parties.

If enforcement does become necessary, mediated agreements are usually subject to contract law. Courts favor enforcing settlement agreements, under state contract law. Cases along these lines include: Jeff D., 899 F2d 753,759 (9 Cir 1989); Botefur, 7 F3d 152, 156 (9 Cir 1993); Raymond, 120 Or App 630 (1993); Neilson, 881 F Supp 455 (D Or 1995); and Kaiser, 136 Or App 566 (1995).

If there is a pending Due Process Hearing, the parties might jointly request the Hearing Officer to enter their agreement as a Stipulated Order. Then if enforcement was needed at a later date, the hearing process might more easily be used. The Hearing Officer has discretion whether to enter a stipulated order or not, and it is not clear what factors would influence that decision. See OAR 581-015-0095(5). However, hearing officers would probably limit the terms of stipulated orders to only the matters within their jurisdiction, even if the parties resolved additional matters (such as communication plans or personnel re-assignment) as well.

4. Can a party be asked to sign a "release of claims", or "waiver of rights"?

In order to promote settlement of a controversy, one party may ask the other party to release claims or waive rights for any further relief for a particular situation. For example, if a school district was willing to reimburse a parent for a certain amount of privately obtained educational services, the district might first ask the parent to give up the right to come back later and ask for more money for the same situation. Releasing past claims is a common way for parties to obtain closure of a matter or put a particular time period behind them (such as the past school year), and move forward. Normally, future claims are unaffected.

Sometimes in mediation, a party considers revising a particular request in order to accomplish a satisfactory resolution of more important matters. Asserting all potential claims is exhausting and people tend to prioritize their concerns. For example, a parent might feel that securing the appropriate placement and services for the upcoming school year is more important than continuing to advance a challenge to the district's denial of ESY for the past summer. Their mediated agreement might state that the parent waives the right to challenge the denial of ESY for the past summer.

Federal courts impose higher standards for waiver of federal rights (e.g. IDEA rights), looking at the "totality of circumstances" to ensure that the waiver was voluntary and knowing.

Cases along these lines include: Salmeron, 724 F2d 1357,1361 (9 Cir 1983); and W.B v. Matula, 67 F3d 484,497 (3 Cir 1995). In these situations, it might be particularly helpful for the party waiving rights to obtain independent legal advice and take time to thoroughly review the draft of an agreement before signing.

5. Can the student later challenge a Mediated Agreement that the student's parent made with the school district?

When the student meaningfully participates in the mediation process, the opportunity to craft a satisfactory and durable agreement is enhanced.

When the parent takes the lead in asserting the student's needs and entering into a mediated agreement to resolve a dispute, the school district may worry that later on the student might challenge the agreement as unfair and try to avoid its impact. This kind of "collateral attack" might happen while the student is still a minor, or when the student reaches the age of majority (which in Oregon is upon the age of 18, marriage, or court-ordered emancipation, whichever occurs first).

These collateral attacks are rare. The student likely would need to obtain independent counsel. Success would depend on the circumstances. To minimize this risk, a school district might ask a parent to "warrant" that they have the authority to make the agreement on behalf of their child, and to "indemnify" (pay back) the school district if the student succeeds in getting additional relief.

6. Should we mediate again if we have another dispute in the future?

The parties could decide to include in their mediated agreement a "re-mediation clause" or "future dispute resolution clause", making a mutual commitment to return to mediation if there is a future dispute.

They could tailor the scope of the re-mediation clause. Their commitment could merely be to return to mediation if they have a future dispute over how to implement or enforce the current mediated agreement. They might agree that mediation must be attempted in good faith, before either party seeks formal legal redress (such as requesting a due process hearing). If they want to plan more broadly, the parties could commit to utilizing mediation if they develop a future dispute over new matters.

The parties could also specify how they would go about selecting the future mediator and how they might allocate the costs of future mediation.