

# MEDIATION

## WHAT IS MEDIATION?

Mediation is a managed process during which the parties discuss their dispute in an attempt to reach a mutually acceptable resolution. The manager of the process is called the “mediator.” The mediator is a neutral participant, skilled in methods of facilitating effective communication between the parties. In mediation, it is the parties themselves that determine if a resolution is reached, and if so, the terms of their agreement.

## HOW DOES MEDIATION WORK?

The manner in which the mediation is conducted will vary somewhat depending on the methods that a particular mediator has found most successful. Typically, the mediator will begin with his or her own introductory remarks explaining his or her role, the roles of the other participants, and the steps that will be followed during the mediation. The introduction will include a discussion of proposed “ground rules” or guidelines to be agreed upon by the parties before engaging in mediation. These often include an agreement not to interrupt another person while speaking, a promise not to personally attack another party, and commitments not to engage in sarcasm or other counterproductive behavior.

Following brief introductory remarks by the mediator, the parties will generally be asked to provide an opening statement addressed to the other parties. Who goes first is determined by the mediator if the parties do not otherwise agree themselves. An opening is the opportunity for each side to describe in brief terms the background of the dispute and issues included in the due process hearing request. The mediator will often summarize the parties’ positions including those things which are not disputed and those things which are.

After summarizing the parties’ positions, the mediator will invite the parties to begin the most important part of the mediation, the negotiation stage. Most of the time in mediation will be spent in negotiation with the parties exploring all reasonable options for resolution of the dispute. During this stage, any of the participants may request to meet with any other participant, including the mediator, in private. This is often called a “caucus.”

## WHO WILL BE THE MEDIATOR?

Mediators are all Administrative Law Judges (ALJs) with the Special Education Division of the Office of Administrative Hearings, a division of state government. While the ALJs carry the title of “judge,” their role in mediation is quite different than the job they perform when hearing a due process hearing. As a mediator, their role is not to determine who is right or wrong and render a decision. In mediation, they manage the communication between the parties. All ALJs are trained in mediation and special education law.

An ALJ who serves as a mediator is expressly forbidden from presiding over a due process hearing in a matter that he or she mediated. He or she also forbidden by law and ethical

obligations from discussing the mediation with anyone not involved in the mediation, including the ALJ who will preside over the due process hearing, should one be necessary.

## CONFIDENTIALITY

By federal and state law, all communications during the mediation are confidential and may not be used by any participant as evidence in a later due process hearing or civil proceeding. Anything said, any admission made, and any document prepared in the course of mediation is a confidential communication.

### WHAT HAPPENS WHEN THE PARTIES RESOLVE THE MATTER IN MEDIATION?

By law, once signed by the parties, the document becomes a binding contract. The agreement must be consistent with federal and state special education law. Each party must sign the agreement and each will receive a copy. The terms of the agreement may be enforced in court or, if the parent believes a school district or other agency is not complying with the agreement, by compliance complaint with the state Department of Education.

### WHAT IF MORE INFORMATION IS NECESSARY TO RESOLVE THE DISPUTE?

Multiple mediation sessions are generally not a good idea. However, if the parties agree that critical information is not available, they may agree to continue the mediation for a short time to obtain the information. This might include an additional evaluation, an opportunity for parties to observe a proposed placement, or participation by one or more experts in the mediation.

### WHAT IF MEDIATION IS NOT SUCCESSFUL?

If the mediation is not successful, the Mediator will discuss with the parties the scheduling of upcoming dates for due process hearing. The parties can agree to move forward to hearing on the dates already set or, after demonstrating good cause for a continuance, can work with the Mediator to schedule new hearing dates