A. MEDIATION

Authority: The requirements for mediation are found in the regulations at 34 CFR §300.506.

Question A-1: What is mediation?

Answer: Mediation is an impartial and voluntary process that brings together parties that have a dispute concerning any matter arising under 34 CFR part 300 (the Part B of the IDEA (Part B) regulations) to have confidential discussions with a qualified and impartial individual. The goal of mediation is for the parties to resolve the dispute and execute a legally binding written agreement reflecting that resolution. Mediation may not be used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B. 34 CFR §300.506(b)(1) and (8).

Question A-2: Can OSEP provide a historical context for the mediation provisions in the IDEA statute and regulations?

Answer: States have successfully used mediation as an informal mechanism to resolve disputes between parents and public agencies, even though they were not required to offer mediation prior to 1997. The Education for All Handicapped Children Act,[2] originally enacted into law in 1975, contained no requirement for States to offer mediation. In a comment to the initial regulations implementing Part B of the Education of the Handicapped Act (EHA) published in 1977, the former Department of Health, Education, and Welfare acknowledged that many States pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. The comment indicated that States may wish to suggest that mediation be used to resolve disputes with parents, provided that it was not mandatory and did not operate to deny or delay a parent's right to a due process hearing. 45 CFR §121a.506 and Comment (1977).[3] Based on States' success in using mediation for more than two decades, Congress included a specific provision in the IDEA Amendments of 1997, Public Law (Pub. L.) 105-17. Under section 615(e) of the IDEA, as amended in 1997, States were required to establish mediation procedures to resolve disputes between parents and public agencies, at a minimum, whenever a due process hearing was requested. In

[2] The Education for All Handicapped Children Act refers to Public Law (Pub. L.) 94-142. It is the predecessor statute to Part B of the IDEA.

[3] After the U.S. Department of Education was created, the Part B regulations in part 121a of title 45 of the Code of Federal Regulations (CFR) were removed and recodified in title 34 CFR part 300. The former 34 CFR §300.506 and its accompanying comment were unchanged and remained in effect until May 11, 1999.

the 2004 Amendments to the IDEA, Congress broadened this provision to require States to have procedures to offer mediation to resolve disputes concerning any matter arising under Part B of the IDEA, including matters arising prior to the filing of a due process complaint.

Question A-3: What are the benefits of mediation?

Answer: Although mediation cannot guarantee specific results, States' experience in using mediation has demonstrated a number of benefits. Mediation can be a less expensive and less time-consuming method of dispute resolution between parents and local educational agencies (LEAs), or, as appropriate, State educational agencies (SEAs) or other public agencies. Mediation may result in lower financial and emotional costs compared to due process hearings. Assistance to States for the Education of Children with Disabilities and Early Intervention Program for Infants and Toddlers with Disabilities, Final Regulations, *Analysis of Comments and Changes*, 64 FR 12406, 12611 (Mar. 12, 1999).[4] Because mediation is voluntary and the parties have the flexibility to devise their own remedies, mediation also may result in written agreements where parties have an increased commitment to, and ownership of, the agreement. Some parties report mediation as enabling them to have more control over the process and decision-making. Additionally, because both parties have been involved in developing the mediation agreement, remedies can be individually tailored and contain workable solutions.

Mediation may also be helpful in resolving State complaints under 34 CFR §§300.151-300.153, thus avoiding the need for the SEA to issue a written decision on the complaint. A State's minimum State complaint procedures must provide an opportunity for a parent who has filed a State complaint and the public agency to voluntarily engage in mediation consistent with 34 CFR §300.506. 34 CFR §300.152(a)(3)(ii).

Question A-4: Who are the parties to mediation? Can States offer mediation to individuals and organizations other than parents?

Answer: Parties to mediation are parents[5] of a child with a disability, as defined in 34 CFR §300.30 and the LEA, or, as appropriate, a State agency in

[4] This Q&A document includes references to Assistance to States for the Education of Children with Disabilities and Early Intervention Programs for Infants and Toddlers with Disabilities, Final Regulations, *Analysis of Comments and Changes*, 64 Federal Register 12406, 12537-12656 (Mar. 12, 1999). This document will be cited throughout this Q&A as "64 FR" with the appropriate page number.

[5] Under 34 CFR §300.30(a), the term "parent" means: (1) a biological or adoptive parent of a child; (2) a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; (3) a guardian generally authorized to act as the child's parent, or authorized to make

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accordance with 34 CFR §300.228, the SEA, or other public agencies[6] that have responsibility for the education of children with disabilities.
34 CFR §300.506. Unlike State complaints, which can be filed by an organization or individual other than the child's parents, the IDEA contemplates that mediation must be made available only to parents and public agencies to resolve disputes involving any matter under 34 CFR part 300, including matters arising prior to the filing of a due process complaint. While the IDEA does not require that mediation be made available to non-parents, there is nothing in the IDEA that would prohibit a State from making mediation available to resolve disputes between public agencies, organizations, or individuals other than the child's parent regarding matters arising under the IDEA and its implementing regulations.
34 CFR §300.152(a)(3)(ii) and (b)(1)(ii); see also Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Regulations, *Analysis of Comments and Changes*, 71 FR 46540, 46604 (Aug. 14, 2006).[7]

Question A-5: What is a mediator?

Answer: A mediator is a qualified and impartial individual who facilitates confidential discussions to achieve a resolution of the dispute that is mutually agreeable to the parties. The requirement that the mediator is qualified means that the individual is trained in effective mediation techniques and knowledgeable in laws and regulations relating to the provision of special education and related services. 34 CFR §300.506(b)(1)(iii) and (b)(3)(i). The impartiality requirement means that an individual who serves as a mediator may not be an employee of the SEA or the LEA that is involved in the education or care of

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educational decisions for the child (but not the State if the child is a ward of the State); (4) an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or (5) a surrogate parent who has been appointed in accordance with 34 CFR §300.519 or section 639(a)(5) of the IDEA. Under 34 CFR §300.520(a), a State may provide that when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law), all rights accorded to parents under Part B of the IDEA transfer to the child. Therefore, if a student who has reached the age of majority under State law is exercising parental rights, that student has the right to use the IDEA's dispute resolution procedures, including mediation under 34 CFR §300.506, the State complaint procedures under 34 CFR §§300.151-300.153, the due process complaint and hearing procedures under 34 CFR §§300.507-300.516, and the procedures for expedited due process hearings in 34 CFR §§300.532-300.533.

[6] Under 34 CFR §300.33, the term "public agency" includes the SEA, LEAs, educational service agencies (ESAs), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

[7] This Q&A document includes references to Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Regulations, *Analysis of Comments and Changes*, 71 Federal Register 46540, 46547-46753 (Aug. 14, 2006). This document will be cited throughout this Q&A as "71 FR" with the appropriate page number.

the child and must not have a personal or professional interest that conflicts with the person's objectivity. 34 CFR §300.506(c)(1).

Question A-6: What are the types of issues that can be the subject of mediation?

Answer: The mediation process offers an opportunity for parents and public agencies to resolve disputes about any matter under 34 CFR part 300, including matters arising prior to the filing of a due process complaint. 34 CFR §300.506(a). This includes matters regarding the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to a child with a disability, as well as any other matters arising under 34 CFR part 300 that may not be the subject of a due process complaint. An example of a matter that cannot be the subject of a due process complaint but that can be the subject of mediation is a dispute regarding the alleged failure of a particular SEA or LEA employee to be highly qualified. 34 CFR §300.18(f); see also Question C-1 in *Questions and Answers on Highly Qualified Teachers Serving Children with Disabilities*, January 2007.

Question A-7: Under what circumstances does the IDEA require that mediation be made available to parents of parentally-placed private school children with disabilities[8]?

Answer: The Department provided the following pertinent explanation in Question L-1 in *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, April 2011:

> As provided in 34 CFR §300.140(b), a parent of a child enrolled by that parent in a private school has the right to file a due process complaint [and use the mediation procedures in 34 CFR §300.506] regarding the child find requirements in 34 CFR §300.131, including the requirements in 34 CFR §§300.300 through 300.311. The due process provisions in section 615 of the Act and 34 CFR §§300.504 through 300.519 of the regulations [which include the mediation procedures in 34 CFR §300.506], do not apply to issues regarding the provision of services to any particular parentally-placed private school child with disabilities whom an LEA has agreed to serve because there is no individual right to services for such children under the IDEA. 34 CFR §300.140(a).

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[8] "Parentally-placed private school children with disabilities" means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in 34 CFR §300.13 or secondary school in 34 CFR §300.36, other than children with disabilities covered under 34 CFR §§300.145-300.147. 34 CFR §300.130.

> Disputes that arise about equitable services are, however, properly subject to the State complaint procedures in 34 CFR §§300.151 through 300.153 [described in Section B of this Q&A document]. As provided in 34 CFR §300.140(c), a parent may file a signed written complaint in accordance with the State complaint procedures alleging that an SEA or LEA has failed to meet the private school requirements, such as failure to properly conduct the consultation process.

Under the State complaint procedures, when a parent files a State complaint regarding the private school requirements or the child find requirements in 34 CFR §300.131, including the requirements in 34 CFR §§300.300-300.311, the SEA must give the parent an opportunity to voluntarily engage in mediation consistent with 34 CFR §300.506. 34 CFR §300.152(a)(3)(ii).

In addition, under 34 CFR §300.148 and Supreme Court case law, where FAPE is at issue, parents of a parentally-placed private school child with a disability may utilize the due process procedures, including mediation, if seeking reimbursement for the private school placement based on a denial of FAPE.

Question A-8: Under what circumstances do the Part B regulations prevent public agencies from using mediation?

Answer: The Part B regulations prohibit a public agency from using mediation to seek to override: (1) a parent's failure to respond to a request for, or refusal to consent to, the initial provision of special education and related services (34 CFR §300.300(b)(3)(i)); (2) a parent's revocation of consent for the continued provision of special education and related services to his or her child (34 CFR §300.300(b)(4)(ii));[9] or (3) a parent's refusal to consent, or failure to respond to a request to provide consent, to an initial evaluation or reevaluation of a child who is home schooled or parentally-placed in a private school at parental expense (34 CFR §300.300(d)(4)(i)). Similarly, if parental rights transfer to a student who has reached the age of majority under State law, the public agency also may not use mediation to resolve disputes with students in these three circumstances. 34 CFR §300.520.[10]

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[9] Mediation, pursuant to 34 CFR §300.506(a), may be used to resolve any disputes under Part B of the Act and its implementing regulations before a parent revokes consent for the continued provision of special education and related services. However, for the same reasons that mediation is not allowed when a parent refuses to provide initial consent for services (i.e., to ensure that the parent's right to refuse consent for his or her child's receipt of special education and related services is meaningful), mediation is not appropriate once a parent revokes consent for the provision of special education and related services. 73 FR 73008, 73016 (Dec. 1, 2008).

[10] If a parent refuses consent to an initial evaluation or reevaluation of his or her child who is enrolled in a public school or is seeking to be enrolled in a public school, or if a parent of such a child fails to respond to a request to

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Question A-9: What are some similarities and differences between mediation and due process hearings?

Answer: The goal of mediation and due process hearings under the IDEA is the same – to achieve resolution of the disputed issues. Both processes generally involve the same parties – parents and public agencies – but as noted in Question A-4, States have the option of making mediation available to parties other than parents. The mediator, in the case of mediation, and the hearing officer, in the case of a due process hearing, must be a qualified and impartial individual. Aside from these similarities, there are important differences.

Due process hearing procedures are more formal, and generally the parent and the public agency may be represented by attorneys. The parties also may choose to be accompanied and advised at a due process hearing by an individual who has special knowledge or training with respect to the problems of children with disabilities. However, whether individuals may be represented by non-attorneys at due process hearings is determined by State law. 34 CFR §300.512(a)(1). In contrast, the IDEA is silent on the presence of lawyers or advocates at mediation. For more discussion of who may accompany a party to a mediation session, see Question A-12.

As noted in Question A-6, the issues that can be the subject of mediation are generally broader than the issues that can be raised in a due process complaint requesting a due process hearing.[11]

In mediation, the parties help set the ground rules and identify their potential remedies, and the process must be voluntary at every phase. In contrast, the due process procedures impose specific requirements on the parties and the failure to adhere to such requirements generally has negative consequences. 34 CFR §§300.507-300.508 (due process complaints) and 300.510 (resolution process).[12]

provide consent to an initial evaluation, the public agency may seek to engage in mediation with the parent if it believes that the child would benefit from the evaluation or reevaluation.

[11] Compare, 34 CFR §300.506(a) with 34 CFR §300.507(a).

[12] An LEA is required to convene a resolution meeting within 15 days of receiving notice of the parent's due process complaint and prior to the initiation of a due process hearing, except that the resolution meeting need not be held if the parties agree in writing to waive the meeting or agree to engage in mediation described in 34 CFR §300.506. The IDEA also provides for a 30-day resolution period to resolve the dispute that is the basis for the parent's due process complaint. (Shortened timelines apply to the resolution process when a parent files a due process complaint regarding a disciplinary matter to request an expedited due process hearing.) If the parties reach a resolution of their dispute through this process, it must be reflected in a legally binding written settlement agreement. 34 CFR §300.510. For more information on the resolution process, see Section D of this Q&A document. For more information on expedited due process hearings, see Section E of this Q&A document.

In mediation, the mediator acts as a facilitator and does not pass judgment on specific issues, but the parties may choose to execute a legally binding written agreement. In a due process hearing, the hearing officer is required to render a final decision that contains findings of fact and decisions that would generally include specific remedies. The hearing officer must render a decision in accordance with 34 CFR §300.513(a), including determining whether a child received FAPE.[13]

While mediation is less formal than a due process hearing, all discussions that occur in mediation, including the negotiation discussions, and discussions involving any settlement positions of parties in a mediation session, are confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. 34 CFR §300.506(b)(8). The IDEA is silent as to whether the mediation agreement itself must be kept confidential. However, under 34 CFR §300.506(b)(6)(i), a legally binding mediation agreement must include a statement 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. Regardless of whether the parties enter into a legally binding agreement, all discussions that occurred during the mediation also must be kept confidential. 34 CFR §300.506(b)(8). In contrast, the parent has the right to have the due process hearing open to the public. 34 CFR §300.512(c)(2). Also, the public agency, after deleting any personally identifiable information, must transmit the due process hearing findings and decisions to the State advisory panel and make those findings and decisions available to the public. 34 CFR §§300.513(d) and 300.514(c).

Question A-10: How long does the mediation process take?

Answer: The IDEA does not specifically address the timing of the mediation process. However, mediation is intended to facilitate prompt resolution of disputes between parents and public agencies at the local level and decrease the use of more costly and divisive due process proceedings and civil litigation. 64 FR 12611 (March 12, 1999). Therefore, a State's procedures governing mediation must ensure that: (1) the mediation process is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the IDEA; and (2) each session in the mediation process is scheduled in a timely manner. 34 CFR §300.506(b)(1)(ii) and (5). The length of the mediation process depends on a number of factors, including the type and complexity of issues presented, the availability of the parties, and the willingness of the parties to

[13] The IDEA statute and regulations provide that the hearing officer can find that a child did not receive FAPE on substantive grounds and, under certain circumstances, based on procedural inadequacies. 34 CFR §300.513(a)(2). See also 71 FR 46707 (August 14, 2006).

cooperate. Also, the length of the mediation process will depend on the individual techniques used by the mediator. Unless the parties agree to an extension, the use of mediation may not affect the 30-day resolution period timeline or the 45-day due process hearing timeline established in 34 CFR §§300.510 and 300.515. Likewise, the use of mediation may not affect the 60-day State complaint resolution time limit established in 34 CFR §300.152(a) unless the parties agree to an extension. 34 CFR §300.152(b)(1)(ii).

Question A-11: Does the IDEA address where mediation sessions are held?

Answer: The IDEA provides that each session in the mediation process must be held in a location that is convenient to the parties to the dispute. 34 CFR §300.506(b)(5). OSEP encourages the parties to work together to determine a convenient location for a mediation session that is acceptable to both parties. If the parties are comfortable with the location of the mediation session, it is more likely that they will work cooperatively to achieve a resolution of their dispute.

Question A-12: Who may participate in, or attend, the mediation session? May parents or public agencies bring their attorneys to mediation sessions and, if so, under what circumstances?

Answer: The IDEA does not address who may accompany a party at the mediation session. Because successful mediation often requires that both parties understand and feel satisfied with the plan for conducting a mediation session, it is a best practice to discuss and disclose who, if anyone, will be accompanying the party at the mediation session prior to that session. Because mediation is voluntary on the part of the parties, either party has the right not to participate for any reason, including if the party objects to the person the other party wishes to bring to the mediation session. This could include a party's objection to the attendance of an attorney representing either the parent or the public agency. For example, if the parent wishes to bring an attorney to the mediation session and the LEA objects, the parent may choose not to participate.

Question A-13: May a child with a disability who is the subject of the mediation process attend the mediation session with his or her parent?

Answer: The IDEA does not address whether the child who is the subject of the mediation can attend the mediation session; therefore, a parent may choose to have his or her child present for all or part of the mediation session. The age and maturity of the child should be considered in determining the appropriateness of having the child attend the mediation with his or her parent. For some youth with disabilities, observing and even participating in

the mediation may be a self-empowering experience where they can learn to advocate for themselves. Also, if a State provides that all rights accorded to parents under the IDEA transfer to the student who has reached the age of majority consistent with 34 CFR §300.520, then the right to participate in mediation would also transfer to the student.

Question A-14: What options are available if a parent declines a public agency's request to engage in mediation?

Answer: As noted previously, the IDEA and its implementing regulations do not allow a public agency to require a parent to participate in mediation because mediation is voluntary. However, a public agency may establish procedures to offer parents and schools that choose not to use the mediation process an opportunity to meet, at a time and location convenient to the parents, with a disinterested third party: (1) who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the IDEA; and (2) who would explain the benefits of, and encourage the use of, the mediation process to the parents. 34 CFR §300.506(b)(2). Public agencies that choose to establish these procedures must make clear to parents and schools that they have the opportunity to participate in the meeting with the disinterested third party, but that their participation is voluntary. The disinterested third party would explain the benefits of mediation, including that it is voluntary, and if successful, could result in the resolution of the dispute without the need to use more formal, costly, and adversarial due process proceedings.

Question A-15: May a State use IDEA funds for recruitment and training of mediators?

Answer: Yes. Under 34 CFR §300.704(b)(3)(ii), some portion of the funds the SEA reserves for other State-level activities must be used to establish and implement the mediation process required by section 615(e) of the IDEA and 34 CFR §300.506, including providing for the costs of mediators and support personnel. This can also include the recruitment and training of mediators.

Question A-16: Who pays for the mediation process?

Answer: The IDEA provides that the State must bear the cost of the mediation process required under section 615(e) of the IDEA and 34 CFR §300.506, including the fee charged by the mediator and the costs of meetings described in 34 CFR §300.506(b)(2) to discuss the benefits of the mediation process. Therefore, States may not require their LEAs to use Part B funds to pay the costs of mediation. 71 FR 46624 (August 14, 2006). In addition, the IDEA does not allow States that choose to make mediation available to parties other

than parents or offer mediation on matters not addressed in the IDEA to use IDEA funds for those activities.

Question A-17: How is a mediator selected?

Answer: The success of mediation is closely related to the mediator's ability to obtain the trust of both parties and commitment to the process. 64 FR 12612 (March 12, 1999). One important way to establish this trust is the selection of a qualified and impartial mediator. To build trust and commitment in the process of selecting a mediator, the IDEA provides several mechanisms for selecting a mediator. The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations related to the provision of special education and related services.
34 CFR §300.506(b)(3)(i). The State must select a mediator from this list on a random, rotational, or some other impartial basis. 34 CFR §300.506(b)(3)(ii). The State's selection of mediators on an impartial basis would include permitting the parties involved in a dispute to agree on a mediator. 71 FR 46695 (August 14, 2006).

Question A-18: May more than one mediator be selected to conduct mediation under the IDEA?

Answer: No. The mediation process required under the IDEA specifies that the mediation is conducted by a qualified and impartial mediator who is trained in effective mediation techniques. 34 CFR §300.506(b)(1)(iii). The use of a single mediator is important to ensure clear communication and accountability. 64 FR 12611-12612 (March 12, 1999). Therefore, it is impermissible for States to use a panel of mediators to resolve disputes between parents and public agencies involving matters arising under 34 CFR part 300.

Question A-19: May current LEA employees serve as mediators?

Answer: The IDEA provides that a mediator under 34 CFR §300.506 may not be an employee of the SEA or the LEA that is involved in the education or care of the child and must not have a personal or professional interest that conflicts with the person's objectivity. 34 CFR §300.506(c)(1). Therefore, it is impermissible under the IDEA for a current employee of an LEA that is involved in the education or care of the child to serve as a mediator for his or her own LEA. However, if an employee of a different LEA that is not involved in the education or care of the child has no personal or professional interest that would conflict with his or her objectivity and possesses the requisite qualifications, that individual can serve as a mediator in a dispute involving the parents and the LEA that their child attends. Notice of Proposed

Rulemaking Implementing the IDEA Amendments of 2004, 70 FR 35782, 35808 (Jun. 21, 2005).

Question A-20: Is it a conflict of interest if a mediator is paid by a State agency?

Answer: No. A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency solely because he or she is paid by the State agency to serve as a mediator. 34 CFR §300.506(c)(2).

Question A-21: Does the IDEA address what would constitute effective mediation techniques?

Answer: No. The IDEA requires that a mediation session be conducted by a qualified and impartial mediator who is knowledgeable in laws and regulations relating to the provision of special education and related services and is trained in effective mediation techniques. 34 CFR §300.506(b)(1)(iii) and (b)(3)(i). The IDEA requirement for the use of a qualified and impartial mediator trained in effective mediation techniques helps ensure that decisions about the effectiveness of specific techniques, such as the need for face-to-face negotiation or telephone communications are based upon the mediator's independent judgment and expertise. Because of the need to allow flexibility in the independent judgment and expertise of each mediator and the unique issues of each dispute, other than providing for the confidentiality of discussions that occur during mediation, the IDEA does not address the specific techniques or procedures that States may require their mediators to use. Whether formal training and certification for mediators are required is a decision left to each State, depending on State policy. 71 FR 46695 (August 14, 2006).

Question A-22: If the parties to the mediation process resolve their dispute, must the agreement reached by the parties be in writing?

Answer: Yes. If the parties resolve a dispute through the mediation process, the parties must execute a legally binding written agreement that sets forth that resolution and 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. In order for the agreement to be legally binding, it must be in writing. The agreement must be signed by both the parent and a representative of the public agency who has the authority to bind the agency. 34 CFR §300.506(b)(6). It is important that the parties understand that the mediation agreement is legally binding and that it is enforceable in any State court of competent jurisdiction or in a district court of the United States or by the SEA, if applicable. 34 CFR §§300.506(b)(7) and 300.537. Parties are free to consult with others before entering into a mediation agreement.

Question A-23: Are discussions that occur in the mediation process automatically confidential or is the confidentiality of the mediation session a matter that must be mediated and documented as a part of the mediation agreement?

Answer: Under 34 CFR §300.506(b)(8), 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 34 CFR part 300. This requirement is automatic and may not be altered or modified by parties to mediation conducted under 34 CFR §300.506. Further, this confidentiality requirement applies regardless of whether the parties resolve a dispute through the mediation process. If the parties resolve a dispute through the mediation process, they must execute a legally binding agreement that also includes a statement that all discussions that occurred during the mediation process will remain confidential. 34 CFR §300.506(b)(6)(i).

Question A-24: Must a written mediation agreement be kept confidential?

Answer: While discussions that occur during the mediation process must be confidential, neither the IDEA nor its implementing regulations specifically address whether the mediation agreement itself must remain confidential. However, the confidentiality of information provisions in the Part B regulations in 34 CFR §§300.611-300.626 and the Family Educational Rights and Privacy Act (FERPA), and its implementing regulations in 34 CFR part 99 would apply. Further, there is nothing in the IDEA or its implementing regulations that would prohibit the parties from agreeing voluntarily to include in their mediation agreement a provision that limits disclosure of the mediation agreement, in whole or in part, to third parties. Also, there is nothing in the IDEA that would prohibit the parties from agreeing to permit the agreement to be released to the public.

Question A-25: Does the IDEA allow discussions that occur during the mediation process to be disclosed during the resolution of a State complaint?

Answer: No. As noted above, the IDEA requires that discussions that occur during the mediation process must be confidential. 34 CFR §300.506(b)(8). Similarly, if the parties execute a written agreement as a result of mediation, that agreement must include a statement that all discussions that occurred during the mediation process must remain confidential. 34 CFR §300.506(b)(6)(i). Neither the IDEA nor its implementing regulations create exceptions to these confidentiality requirements for discussions that occurred during the mediation process when the State resolves a State complaint pursuant to 34 CFR §§300.151-300.153. Maintaining the confidentiality of mediation

discussions during subsequent State complaint resolution activities is essential to protect the integrity of both processes.

Question A-26: May parties to the mediation process be required to sign a confidentiality pledge or agreement prior to, or as a precondition, to the commencement of the mediation process?

Answer: No. In the Notice of Proposed Rulemaking implementing the IDEA Amendments of 2004, the Department included a provision that would have required parties to a mediation to sign a confidentiality pledge, without regard to whether the mediation ultimately resolved the dispute. 70 FR 35870 (June 21, 2005). This proposed provision was based on Note 208 of Conf. Rpt. (Conference Report) No. 108-779, p. 216 (2004).[14] However, the Department decided to remove this proposed provision when the final Part B regulations were published in 2006 based on the statutory requirement in section 615(e)(2)(G) that discussions that occur during the mediation process must remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. 71 FR 46696 (August 14, 2006).

Additionally, if the parties resolve a dispute through the mediation process, as noted above, 34 CFR §300.506(b)(6)(i) requires that the legally binding written agreement contain a statement 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. 34 CFR §300.506(b)(6)(i). This is so even if the parties do not enter into a mediation agreement. However, nothing in these regulations is intended to prevent States from allowing parties to sign a confidentiality pledge to ensure that discussions during the mediation process remain confidential, irrespective of whether the mediation results in a legally binding written agreement resolving the dispute. 71 FR 46696 (August 14, 2006).

Question A-27: May a State use nonjudicial mechanisms (e.g., State complaint procedures) to resolve allegations that the public agency did not implement a mediation agreement?

Answer: Yes, as long as the use of those mechanisms is voluntary and does not operate to deny or delay the parties' right to seek judicial enforcement of mediation agreements. The IDEA provides that parties who resolve a dispute through the mediation process under 34 CFR §300.506 must execute a legally binding written agreement that sets forth that resolution. 34 CFR §300.506(b)(6). A written, signed mediation agreement is enforceable in any State court of

[14] Conference Report refers to the joint explanatory statement of the Committee of Conference. This report accompanied HR 1350, the bill to reauthorize the IDEA in 2004.

competent jurisdiction or in a district court of the United States. 34 CFR §300.506(b)(7). However, notwithstanding the provisions in 34 CFR §§300.506(b)(7) addressing judicial enforcement of mediation agreements and 300.510(d)(2), addressing judicial enforcement of resolution agreements, nothing in part 300 would prevent the SEA from using other mechanisms to seek enforcement of those agreements, provided that the use of the State's mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States. 34 CFR §300.537. Therefore, in addition to judicial enforcement of mediation and resolution agreements, 34 CFR §300.537 gives States the flexibility to allow enforcement of those agreements through other State mechanisms such as their State complaint resolution procedures in 34 CFR §§300.151-300.153. 71 FR 46604-46605 and 71 FR 46703 (August 14, 2006).

Question A-28: May a parent file a State complaint on matters that were not addressed in, or that arose after the time covered by, the mediation agreement?

Answer: Yes. If the mediation agreement covers a specific time period and that time period has passed, the parent may file a State complaint if the issues that were the subject of the mediation agreement recur or if new issues arise. Also, if there are issues that were not addressed by the mediation agreement, the parent may file a State complaint to seek to resolve those issues. However, once both parties have executed a legally binding mediation agreement, the parties are bound by that agreement and a parent cannot seek to change the terms of that agreement by filing a State complaint to alter that agreement.

Key regulatory references related to the mediation process, as cited above, can be found at http://idea.ed.gov/explore/home, and include the following:

- 34 CFR §300.140
- 34 CFR §§300.151-300.153
- 34 CFR §300.506
- 34 CFR §300.520
- 34 CFR §300.537
- 34 CFR §§300.611-300.626

The Q&A documents cited in this section can be found at:

- *Questions and Answers on Highly Qualified Teachers Serving Children with Disabilities*, January 2007: http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C2%2C
- *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, April 2011: http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C1%2C