2011 Administrative Law Judge and Mediator Training

Sponsor: California Office of Administrative Hearings

March 21-25, 2011

DoubleTree Hotel - Mission Valley
San Diego, CA
2011 California Special Education Hearing Officer & Mediator Training

presented by

The Academy for IDEA Administrative Law Judges and Hearing Officers

Contents

<table>
<thead>
<tr>
<th>Day/Date</th>
<th>Time</th>
<th>Speaker/Topic</th>
<th>Tab</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contact information and speaker biographies</td>
<td>1:00 - 4:30 pm</td>
<td>Jerome M. Sattler Bullying And Students with Disabilities</td>
<td>Faculty</td>
</tr>
<tr>
<td>Monday March 21</td>
<td>1:00 - 4:30 pm</td>
<td>Mary Schwartz The Nexus Between the DSM &amp; IDEA: Social Maladjustment v. Emotional Disturbance</td>
<td>Session 1</td>
</tr>
<tr>
<td>Tuesday March 22</td>
<td>9:00 am - Noon</td>
<td>Prof. Elizabeth A. Francis How to Write Better Decisions</td>
<td>Session 2</td>
</tr>
<tr>
<td>Wednesday, March 23</td>
<td>9:00 am - Noon</td>
<td>Prof. Philip T. K. Daniel ALJs, FAPE and NCLB</td>
<td>Session 4</td>
</tr>
<tr>
<td>Lynwood (Lyn) E. Beekman Considerations for Better Management of Your Hearings</td>
<td>1:30 - 4:30 pm</td>
<td>Prof. Mary B. Culbert Mediation of Special Education Disputes</td>
<td>Session 5</td>
</tr>
<tr>
<td>Thursday, March 24</td>
<td>9:00 am - Noon</td>
<td>Alice K. Nelson Compensatory Education: Where Are We?</td>
<td>Session 6</td>
</tr>
<tr>
<td>Friday, March 25</td>
<td>9:00 am - Noon</td>
<td>Prof. Jane Wettach Review of Recent Litigation</td>
<td>Session 8</td>
</tr>
</tbody>
</table>
Joint the new Special Education Section of NAALJ

The Special Education (SPED) Section of NAALJ is beginning a membership drive to bolster its participation in the next reauthorization of IDEA (see related story following/below). The SPED Section was established several years ago, in response to NAALJ members’ interest in having a separate section in which they could meet and network with fellow independent hearing officers (IHO), regardless of title.

The only requirements for membership in the Section are membership in NAALJ ($50.00 per year) and being a special education impartial hearing officer (IHO) under the Individuals with Disabilities Education Act (IDEA). The broader objective of the Section is to provide a forum for the sharing of ideas and experiences and for contributing members’ unique viewpoint to the improvement of special education dispute resolution process. You can join NAALJ online at its website: www.naalj.org. To join the Section and to discuss how you can participate in this effort, please contact the Section Chair, Jim Rosenfeld at rosenfeld@seattleu.edu or Jim Murray, the NAALJ Special Education Section Liaison at j.murray@OAH.state.md.us.

What’s your suggestion to improve due process hearings?

✔️ More authority to manage hearings?
✔️ Clearer standards for sufficiency motions?
✔️ More guidance on pro se hearings?
✔️ Better definition of compensatory education?

We want to hear from you! We’re compiling, considering and refining suggestions for improving IDEA due process – culminating in a group discussion at the 10th Academy for IDEA Administrative Law Judges and Hearing Officers on July 12-15, 2011.

Submit your suggestion(s) now to rosenfeld@seattleu.edu. We welcome suggestions from any current or former special education hearing officer, whether or not you contemplate attending the Academy in July. Just click on the preceding link and send us your ideas. We may contact you to obtain clarification or additional information.
Speaker Biographies and Contact Information
Faculty Contact and Biographical Information

Lynwood ("Lyn") E. Beekman
Special Education Solutions
5000 Chipping Camden Lane
Okemos, MI 48864
(517) 290-2555
ses@spedsolutions.com

For the first 16 years of his legal career Lyn represented parents and their children with disabilities. During this same period and later, he also represented the Michigan Education Association and its members, including teachers, school psychologists, school social workers, bus drivers, paraprofessionals, etc. From 1986 through 1997, he represented just school districts on matters relating to special education and Section 504. In January 1998, he left the practice of law to establish Special Education Solutions (SES), a special education dispute resolution and training center.

Since 1978, Lyn has served as a hearing officer in over 600 hearings. He has also served as a state review officer in 3 states, a mediator, neutral evaluator, arbitrator, and complaint investigator in another 400 cases. In addition, Lyn has provided consultive assistance or hearing officer trainings for 46 states and the Bureau of Indian Affairs, as well as presentations at state and national conferences on how to avoid and resolve disputes.

Most recently Lyn served as the Chief Hearing Officer of special education hearings for the Office of the State Superintendent of Education for the District of Columbia.

Prof. Mary B. Culbert
Director, The Center for Conflict Resolution
Loyola Law School
919 Albany Street
Los Angeles, California 90015-1211
mary.culbert@lls.edu

Professor Mary B. Culbert is the Director of The Center For Conflict Resolution, where she previously served as a senior mediator supervising students. She is a bilingual certified mediator and a 1984 graduate of Loyola Law School. In 1993, Ms. Culbert began serving as a community and court mediator...
and received the “Rookie of the Year Award” from the Los Angeles County Bar Association’s Dispute Resolution Services. She returned to Loyola in 1994 as an Adjunct Professor of law and founding Director of the Disability Mediation Center of the Western Law Center for Disability Rights (currently the Disability Rights Legal Center).

After practicing law for several years, Ms. Culbert became a Bilingual Certified Mediator and has mediated extensively since 1992 in numerous community, government agency and court programs. She served as a resource to local, state and federal agencies regarding the design and implementation of mediation programs. She sat on the California State Bar ADR Committee and Chaired its Ethics Subcommittee since its inception in 1997 until September 2001, and still sits as an advisor to that Committee today.

Ms. Culbert has served on numerous boards, committees and mediation panels over the past 15 years. She has trained and lectured extensively on mediation skills, advanced mediation techniques, mediation ethics, disability mediation and legal issues in mediation. She served an appointment to the Judicial Council, Civil and Small Claims Advisory Committee, ADR Subcommittee Working Group on Uniform Procedures for Addressing Complaints about Court-Program Mediators. She was recognized in the "TOP NEUTRALS" Supplement to the Los Angeles and San Francisco Daily Journals and to the Sacramento Recorder, in the section on "Community Mediators: taking it to the streets" in 2007. In 2009, she received the Ester Soriano Peacemaker of the Year Award from Los Angeles County DRPA Program Community Mediators, and in 2010, the Ester Soriano Award for Excellence in Community Mediation from the California Dispute Resolution Council.

**Professor Philip T.K. Daniel**

William Ray and Marie Adamson Flesher Professor of Educational Administration and Adjunct Professor of Law  
Ohio State University  
301C Ramseyer Hall, Building 090  
29 W Woodruff Ave  
Columbus, OH 43210  
(614) 292-7991  
Daniel.7@osu.edu

Philip T.K. Daniel is the William Ray and Marie Adamson Flesher Professor of Educational Administration and adjunct professor of Law at The Ohio State University. Previously, he held professorial posts at the University of Minnesota, Kent State University, and Northern Illinois University where he served as Professor and Associate Dean of the Graduate School.

He earned his doctorate in education from the University of Illinois, Urbana, and his J.D. from the Northern Illinois University College of Law, with further study at the Catholic University School of Law. Dr. Daniel did post doctoral work in higher education administration as an American Council on Education (A.C.E.) fellow at Washington University in St. Louis.
Since arriving at Ohio State his research has focused on legal research techniques with expertise in school law, higher education law, special education law, and the law of technology in education. In 1993 Dr. Daniel received Ohio State's highest honor for faculty, the Alumni Award for Distinguished Teaching, and was subsequently inducted into the university's Academy of Distinguished Teaching. He was president of the Education Law Association (ELA) 2004-05 and served as a member of the ELA Board of Directors from 1999-2005. In 2006 the Education Law Association bestowed upon him the Marion McGhehey Award, the highest award of the organization for his research in and service to the field.

Professor Daniel is the author of numerous refereed articles, law review articles, book chapters, monographs, and reports and is co-author of the books, LAW AND PUBLIC EDUCATION; EDUCATION LAW AND THE PUBLIC SCHOOLS: A COMPENDIUM; and the upcoming, LAW, POLICY, AND HIGHER EDUCATION. He is a member of the Editorial Advisory Committee of West's Education Law Reporter, and is on the editorial boards of the Brigham Young University Journal of Law and Education, the Journal of Education and Urban Society, the Journal of Juridical Studies, and the Encyclopedia of Education Law.

Professor Elizabeth A. Francis
Associate Professor of Judicial Studies and English
University of Nevada-Reno
60 Anson Drive
Reno, NV 89503-2504
(775) 747-0897
eafrrancis@sbcglobal.net

Professor Elizabeth Francis serves as Associate Professor of English and Judicial Studies at the University of Nevada, Reno, as Lead Faculty for Judicial Writing courses at the National Judicial College, and as thesis adviser for the Master of Judicial Studies Degree Program at the National Judicial College and the University of Nevada, Reno.

A Fulbright Scholar at the University of London from 1962-63, Professor Francis received her Ph.D. from Yale University in 1970. She was Assistant Professor in the Yale English Department for ten years before joining the faculty at UNR. Professor Francis initiated judicial writing as a field of study at The National Judicial College. She has coordinated and taught the week-long Judicial Writing course since its inception in 1982. Professor Francis teaches legal and judicial writing in courts, agencies, conferences and law firms throughout the United States, including the National Labor Relations Board, the United States Tax Court, the Department of Defense, Office of Environmental Appeals, the Executive Office of Immigration Review, the appellate division of the American Bar Association, and the United States Office of Patents and Appeals.

Most recently Professor Francis has acted as plain language consultant for civil jury instruction revision committees in Pennsylvania and Indiana. Indiana’s plain language instructions were published by Lexis/Nexis in August, 2010.
Alice K. Nelson
Senior Attorney
Southern Legal Counsel, Inc.
14043 Shady Shores Drive
Tampa, FL 33613
(352) 271-8893
alice.nelson@southernlegal.org

Alice K. Nelson has practiced with Southern Legal Counsel (a public interest law firm) (www.southernlegal.org) since 1988 and was until 2004 its Executive Director. She is now Senior Attorney. Ms. Nelson has worked for the Developmental Disabilities Law Project at the University of Maryland and Bay Area Legal Services. She was a law clerk to the late Honorable Thomas A. Clark when he was on the former Fifth Circuit (now the Eleventh Circuit). For eight years prior to coming to SLC, she was in private practice specializing in plaintiffs’ employment law, special education issues, guardianship, and general civil rights.

Jerome M. Sattler
Emeritus Professor
Department of Psychology, San Diego State University
P.O. Box 3557
La Mesa, CA 91944-3557
(619) 460-3667
jsattler@sciences.sdsu.edu

Jerome M. Sattler, Ph.D. is a Diplomate in Clinical Psychology of the American Board of Professional Psychology. He received his Ph.D. in 1959 and his M.A. in 1953 from the University of Kansas. His B.S. in psychology was from City College of New York in 1952. He is a Fellow of the American Psychological Association and was awarded a Fulbright lectureship in 1972. He has taught at Fort Hays Kansas State College, the University of North Dakota, and since 1965, joined the Psychology Department at San Diego State University. In August 1994, he retired from active teaching and became Professor Emeritus.
Mary Schwartz has been an IDEA hearing officer in Illinois since July 2005. Prior to being appointed as a hearing officer, Mary’s legal work focused on working with children and adults with disabilities. She worked in a small law firm representing families in special education matters, mental health issues and also was legal director at the Center for Disability and Elder Law (CDEL), a legal aid agency that provides services to people with disabilities and the elderly.

Mary also has an extensive background in mental health. She is a licensed clinical professional counselor in Illinois with over thirty years of mental health experience. She has experience in multiple treatment settings, including an outpatient clinic in a hospital, residential treatment, community mental health, and private practice. She worked at the University of Chicago's Sonia Shankman Orthogenic School for ten years as a counselor and therapist and later returned for a year as interim executive director. Mary also was mental health director at a community mental health center in Chicago that serves the Asian immigrant and refugee community.

Mary has a master's degree in educational psychology from the University of Chicago and a juris doctorate from Valparaiso University School of Law. She also is a trained divorce mediator and provides mediation services to parents who are seeking help developing parenting/child custody agreements.

Professor Jane Wettach teaches a seminar connected with The Children’s Education Law Clinic as well as Education Law. Previously, she was a Supervising Attorney in the AIDS Legal Assistance Project and has taught in the first year Legal Analysis, Research & Writing program. She joined the Duke Law School
faculty in 1994. In 2002, she became the first director of Duke Law School’s Children’s Education Law Clinic, where she has developed expertise in the law of special education and school discipline. She is currently a frequent speaker on issues involving the educational rights of children, especially children with disabilities.

Professor Wettach is a member of the Juvenile Justice & Children’s Rights Section of the N.C. Bar Association, the Council of Parent Attorneys and Advocates, the Clinical Legal Education Association, and the American Bar Association Children’s Rights Litigation Committee. She is an active member of the North Carolina Association of Women Attorneys, serving for many years on the Board of Directors and as its President in 1987. She has written several articles for state bar journals about women in the practice of law and education issues. Locally, she is member of the Board of Directors of The Augustine Project, a program that provided reading tutors to low-income children. She was previously a member of the Board of Directors of Genesis Home, a transitional housing program for homeless families, and a Habitat for Humanity volunteer. Professor Wettach obtained a Bachelor of Arts in Journalism from the University of North Carolina at Chapel Hill in 1976 and worked as a journalist for several years. In 1981, she obtained a J.D. with Honors from the University of North Carolina School of Law, where she served on the North Carolina Law Review.

Organization and Management

S. James Rosenfeld, Director
National Academy for IDEA Administrative Law Judges and Hearing Officers
Adjunct Professor
Seattle University School of Law
P.O. Box 222000, Sullivan Hall
Seattle, WA 98122-1050
(206) 447-8050
rosenfeld@seattleu.edu

Professor Rosenfeld joined the Law School in September 2001 as supervisor of the Special Education Clinical program until 2005. Thereafter, he served as Director of Continuing Legal Education until June 2009, following which he became Director of Education Law Programs. In 2002, he established the National Academy of IDEA Administrative Law Judges and Hearing Officers, which has trained special education hearing officers from over 25 states. He currently serves as Chair of the Special Education Section of the National Association of Administrative Law Judiciary (NAALJ). He is the founder of COPAA (The Council of Parent Attorneys and Advocates), a private, non-profit organization established to improve the quality and increase the quantity of legal resources for parents of children with disabilities. In April 2002, Jim was invited to testify before the President’s Commission on Excellence in Special Education. He also participated in the Monitoring Stakeholders Project convened by the U.S. Department of Education, Office of Special Education Programs (OSEP), to consider changes in OSEP’s monitoring and compliance (“Focused Monitoring”). He has had a long interest in improving the IDEA hearing system and, in 1985, testified before Congress on suggested improvements.
Session 1

Jerome M. Sattler, Emeritus Professor
Department of Psychology
San Diego University

Bullying and Students with Disabilities
1. Overview—Slide 4
2. Case of Phoebe Prince—Slide 34
3. Developmental Correlates of Bullying—Slide 41
4. Dimensions of Bullying—Slide 48
5. Bullying is Multidetermined—Slide 56
6. Characteristics of Victims—Slide 62
7. Characteristics of Bullies—Slide 75
8. Characteristics of Victims-Bullies—Slide 83
9. Reluctance to Report Bullying—Slide 84
10. Contrasts Between Bullying and Cyberbullying—Slide 93
11. Cyberbullying—Slide 102
12. Case of Cyberbullying—Slide 103
13. Asking the Right Questions About a School’s Bullying Policy—Slide 107
15. Case Illustration of Disability Harassment Under Section 504 and Title II —Slide 122
16. Case Illustration Under the Equal Protection Clause— Slide 126
17. Students with Special Needs—Slide 142
18. Survey of Bullying and Victimization Rates Among Students in General and Special Education—Slide 151
19. Specific Populations at Increased Risk for Becoming Victims of Bullying—Slide 162
20. Key Points About Bullying and Students with Special Needs—Slide 191
21. Examples of IEP Goals and Objectives to Help Deal with Bullying—Slide 196
22. Example of Supplementary Aids and Services, Program Modifications, and Supports to Help Deal with Bullying—Slide 202
23. State Laws Against Bullying—Slide 207
24. When Does Bullying Violate the Law?—Slide 213
25. Other Court Rulings—Slide 214
26. Effective Strategies to Counter Bullying in Schools—Slide 231
27. Components of the Olweus Bullying Prevention Program—Slide 265
28. Effectiveness of School Bullying Intervention Programs—Slide 270
29. What Teachers Can Do about Bullying—Slide 271
30. What Students Can Do about Bullying—Slide 277
31. Common Misconceptions about Bullying—Slide 284
32. Postscript—Slide 290
Handout 2
Glossary of Internet Terms

**Avatar.** A graphic alter ego created by the user to use online; it can be a 3D character or a simple icon, human, or whimsical creation.

**Badware.** Bad software, such as viruses and spyware, that steals users’ personal information, sends spam, and commits fraud. See also *Malware.*

**Backing up.** A process used to make copies of computer files in case something happens to the computer or operating system, and the information would otherwise be lost.

**Blocking software.** A program that filters content from the Internet and restricts access to sites or content based on specific criteria.

**Blog.** “Web log”, a site where people regularly post personal observations.

**Buddy list.** A list of people with whom the user can chat through an instant messaging program.

**Chat room.** An online space where the user can meet and exchange information through messages displayed on the screens of others who are in the “room.”

**Children’s Online Privacy Protection Act (OPPA).** An act that gives parents control over what information websites can collect from their children under 13 years of age.

**Cyberbullying.** Bullying or harassment that takes place online; includes posting embarrassing pictures or unkind comments on a person’s profile or sending them via instant message or email.

**Cyberspace.** Describes the information resources available through computer networks.

**Domain name.** The unique name that identifies an Internet site.

**Download.** Copying something from a primary source to a more peripheral one, as in saving something found on the Web to a disk or hard drive.

**Email.** Electronic mail (or email) is mail that computer users can send to each other electronically.

**Facebook.** A social networking website where users can create and customize their own profiles with photos, videos, and information about themselves. It is open to other users who can also write messages on their pages.

**File.** A collection of data stored in a computer and identified by a filename. It can be a text document, picture, audio stream, video stream, or other types of data.

**Filename.** A name used for a file on a computer. Every file stored on a computer's hard disk has a filename that helps identify the file within a given folder.

**Filtering software.** Software that screens information on the Internet and usually allows the user to block access to certain kinds of content.

**Firewall.** Hardware or software that blocks unauthorized communications to or from a user’s computer; it helps keep hackers from using the user’s computer to send out personal information on the computer without the user’s permission.

**Folder.** A place on the hard drive for storing files in any way that makes sense to the computer user.

**Friendster.** A social networking website.

**Global Positioning System (GPS).** A global network of satellites that provides accurate navigational information like driving directions delivered through a GPS receiver.

**Hacking.** A way of breaking into a computer or computer network by evading or disabling security measures.

**Hard copy.** A hard copy is a printed copy of a computer file, an actual piece of paper. When a hard copy is printed from the computer, it can be a text file, photograph, drawing, or any other type of printable file.

**HyperText Markup Language (HTML).** A standardized coding language used to create documents for use on the World Wide Web.

**Individual profiling.** This is a way for a site or service provider to compile personal data about a user in order to build a record of his or her habits (e.g., buying habits or sites visited) or identifiable personal information.
Instant messaging (IM). An Internet procedure that enables two or more people to chat in real time. IM also notifies the user when someone on the user’s buddy list is online.

Intellectual property (IP). Creative products that have commercial value, including copyrighted property, such as books, photos, plays, songs, and poems.

Internet. The vast collection of interconnected networks.

Joint Photographic Experts Group (JPEG). A commonly used format for photographic image files on the computer.

Limited user account. An online setting that grants someone access to some of the computer’s functions and programs, but allows only an administrator to make changes that affect the computer.

Link. A link is a Web address (or URL) imbedded in another document, so that if a user clicks on the highlighted text or button referring to the link, the URL is retrieved.

Login. A way of connecting to a computer system by giving the username and password.

Listervers. A file server that permits members of a discussion group to contact each other by email.

Malware. “Malicious software”; malware includes viruses and spyware that steal personal information, send spam, and commit fraud. See also Badware.

Modem. A machine (hardware) that allows computers to communicate with each other by transmitting signals over telephone lines.

MySpace. A social networking website.

Password. A secret word, phrase, number, or sequence of characters that one must use to gain access to a computer system or to a website.

Patch. A piece of code added to software to fix or update a computer program. It can usually be downloaded from the Web.

Path. This is a means of defining the location of a file or folder on a computer.

Peer-to-peer (P2P) file-sharing. Allows the user to share files online—like music, movies, or games—through an informal network of computers running the same file-sharing software.

Personal Digital Assistant (PDA). A device that can be used as a mobile phone, web browser, or portable media player.

Portable Document Format (PDF). A file format developed by Adobe Systems. Acrobat Reader is required to view a PDF file and can be downloaded free from Adobe.

Personal information. Data that can be used to identify the user, like the user’s name, address, birth date, or social security number.

Personal page. A Web page created by an individual.

Phishing. Used by scam artists to send spam, pop-ups, or text messages to trick the user into disclosing personal, financial, and/or other sensitive information.

Popup. An advertisement that pops up on a computer screen; more generally, it is a small window displayed on top of an existing window on the computer monitor screen.

Privacy settings. Controls available on many social networking and other websites that the user can set to limit who can access his or her profile and what information visitors can see.

Profile. A personal page that the user creates on a social networking or other website to share information about the user and communicate with others.

Search engine. A system (such as Google) used for searching information available on the Web.

Security software. Identifies and protects against threats or vulnerabilities that may compromise the user’s computer or the user’s personal information; includes anti-virus and anti-spyware software and firewalls.

Sexting. Refers to sending or forwarding sexually explicit pictures or messages from a mobile phone.

Smart phone. A mobile phone that offers advanced capabilities and features generally similar to those on a computer.

Short Messaging Service (SMS). Technology that allows text messages to be sent from one mobile phone to another.

Social networking site. A website that allows the user to build a personal profile and connect with others.
Spam (or Spamming). Unsolicited junk email messages sent to a large number of people to promote products or services.

Spyware. Software installed on a user’s computer without his or her consent and used to monitor or control the user’s computer use.


Texting. Sending short written messages from one mobile phone to another phone.

Trojans. [Note: although it’s correct to call these programs Trojans, I think it’s more informative to call them Trojan horse programs.] Deceptive programs designed to allow third parties unauthorized access to the computer systems they infect or to exploit a computer system to send unsolicited email.

Twitter. A social network site that allows users to send and read messages up to 140 characters.

Uniform Resource Locator (URL). The unique address of any Web document.

Upload. Receiving files sent from one computer to another.

Username. Name used to identify the user that, together with a password, grants access to accounts and websites.

YouTube. A video-sharing website owned by Google that allows users to watch other people's videos and place their own videos on the website.

Video calling. Internet services that allow users to communicate using webcams.

Virtual world. A computer-simulated online “place” where people use avatars—graphic characters—to represent themselves.

Virus. Malware that sneaks onto a user’s computer—often through an email attachment—and then makes copies of itself and sometimes uses up all available memory and transmits itself across networks.

Window. Rectangular displays on a computer screen.

Worm. A program that reproduces itself over a computer network. It usually performs malicious actions, such as using up the computer's resources and possibly shutting the system down.

World Wide Web (WWW). A computer network consisting of a collection of Internet sites that offer text and graphics and sound and animation resources; also refers to as the “Web.”

Webcam. A video camera that can stream live video on the Web and may be built into the computer or purchased separately.

Source: Reprinted, with changes in notation, from OnGuard Online (2009, pp. 46–51), Senior Magazine (2010), Sharpened Glossary (2007), and University of California Berkeley Library (2010).
### Handout 3
**Individual Factors, Family and Peer Group Factors, School Factors, and Community and Cultural Factors Related to Bullying**

<table>
<thead>
<tr>
<th>Factor</th>
<th>More likely to engage in bullying</th>
<th>Less likely to engage in bullying</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual factors</td>
<td>• Having a negative self-identity, such as being resentful, bitter, hateful, or angry</td>
<td>• Having a positive self-identity, such as being happy or content</td>
</tr>
<tr>
<td></td>
<td>• Having little empathy for others</td>
<td>• Having empathy for others</td>
</tr>
<tr>
<td></td>
<td>• Having wide-ranging prejudices</td>
<td>• Having few, if any, prejudices</td>
</tr>
<tr>
<td></td>
<td>• Dominating others</td>
<td>• Cooperating with others</td>
</tr>
<tr>
<td></td>
<td>• Being depressed, angry, or upset about events at school or at home</td>
<td>• Being satisfied or happy about events at school or at home</td>
</tr>
<tr>
<td></td>
<td>• Getting poor grades at school</td>
<td>• Getting good grades at school</td>
</tr>
<tr>
<td></td>
<td>• Failing to participate in school activities</td>
<td>• Participating in school activities</td>
</tr>
<tr>
<td></td>
<td>• Partaking in substance use</td>
<td>• Rejecting substance use</td>
</tr>
<tr>
<td></td>
<td>• Valuing aggressive behavior</td>
<td>• Valuing easy-going behavior</td>
</tr>
<tr>
<td></td>
<td>• Showing anger quickly</td>
<td>• Showing anger slowly</td>
</tr>
<tr>
<td></td>
<td>• Having poor problem-solving skills</td>
<td>• Having good problem-solving skills</td>
</tr>
<tr>
<td></td>
<td>• Having an affinity for high-risk behaviors</td>
<td>• Having little affinity for high-risk behaviors</td>
</tr>
</tbody>
</table>
## Family and peer group factors

- Establishing a negative family climate, such as being angry, cold, hostile, rejecting, or indifferent
- Showing low parental warmth, involvement, or affection
- Showing inconsistent discipline (extremely permissive or excessively harsh)
- Having little empathy for children
- Giving little emotional support to their children
- Having an insecure attachment history with children
- Showing little interest in monitoring their children’s activities
- Showing little interest in their children’s school
- Having too little (indifference) or too much involvement (overprotection) in their children’s activities
- Giving direct or indirect permission for aggressive behavior
- Providing poor role models for positive interpersonal relations
- Providing poor role models for constructive problem solving
- Being depressed and angry
- Associating with peers who have deviant norms and practices, such as supporting violent and delinquent behavior; favoring use of tobacco, alcohol, or drugs; and having negative attitudes toward school
- Associating with peers who pressure others to engage in aggressive behaviors

### School factors

- Having a negative school climate
- Having no policies against bullying
- Having teachers who ignore or tolerate bullying
- Having teachers who provide poor supervision
- Having teachers who fail to encourage positive relationships between students and teachers
- Having teachers who have low expectations for their students

## Family and peer group factors

- Establishing a positive family climate, such as being kind, warm, friendly, accepting, or caring
- Showing high parental warmth, involvement, or affection
- Showing consistent discipline (fair and reasonable)
- Having much empathy for children
- Giving much emotional support to their children
- Having a secure attachment history with children
- Showing much interest in monitoring their children’s activities
- Showing much interest in their children’s school
- Having reasonable involvement in their children’s activities
- Teaching their children not to use aggressive behavior directly or indirectly
- Providing good role models for positive interpersonal relations
- Providing good role models for constructive problem solving
- Being happy and calm
- Associating with peers who have regular norms and practices, such as supporting cooperative behavior; rejecting use of tobacco, alcohol, or drugs; and having positive attitudes toward school
- Associating with peers who do not pressure others to engage in aggressive behaviors

## School factors

- Having a positive school climate
- Having policies against bullying
- Having teachers who do not tolerate bullying
- Having teachers who provide good supervision
- Having teachers who encourage positive relationships between students and teachers
- Having teachers who have high expectations for their students
| Community and cultural factors | Lacking cohesion • Having poor resources • Exposing children to violence • Failing to create safe and respectful environments • Promoting and encouraging aggressive behavior • Fostering violence by allowing easy access to firearms and by displaying high levels of violence in the media | Having cohesiveness • Having good resources • Limiting exposure to violence • Creating safe and respectful environments • Promoting and encouraging cooperative behavior • Minimizing violence by not allowing easy access to firearms and by displaying low levels of violence in the media |

*Source:* Adapted from Espelage and Swearer (2009), Georgiou (2008), and Orpinas and Horne (2006). From *Assessment of Children* (New edition, forthcoming, copyright pending). Permission to photocopy this table is granted to individuals who attended Academy for IDEA ALDs and HOs, Seattle University, School of Law, March 21, 2011, San Diego, CA
ASKING THE RIGHT QUESTIONS

The following are some critical questions you should ask in analyzing your particular problem of bullying in your school, even if the answers are not always readily available. The answers to these and other questions will help you guide your school in choosing the most appropriate set of responses later on.

The School

- Does the school believe it has a problem with bullying?
- Is the school aware of the long-term harms associated with bullying and chronic victimization?
- Is the school aware of the different types of behavior that constitute bullying?
- Does the school know how often bullying occurs on the campus each year?
- How does the school’s level of bullying compare with that of other schools?
- What insights do teachers have about bullying? Can they identify some of the reasons why bullying occurs?
- Does the school have a policy to guide teachers and other staff in handling incidents of bullying? If so, what is the policy? And does it include the procedure to follow in reporting bullying?
- Who are the key personnel at the school who handle incidents of bullying (e.g., counselor, school psychologist, vice-principal, nurse, social worker)?
- Does a member of the school staff meet with the parents of students involved in bullying incidents?
- Are students aware of how to report bullying?
- Does the school provide training on bullying to the school staff?
- Do teachers hold regular classroom meetings with their students to discuss issues related to bullying and peer relations?
- Has the school engaged parents and other members of the community on bullying prevention?

Offenders

- How are incidents of bullying handled?
- How does the school identify bullies? Are records kept? Are they adequate? Are school counselors (or other professionals) in the loop?
- Where do bullies operate at the school?
- When does bullying occur at those locations?
- Are those who supervise the locations during those times trained to identify and appropriately handle bullying incidents?
- Given that most bullying occurs in areas where there are no teachers, is the current method for identifying bullies adequate?
- Is there increased adult supervision in “hot spots” for bullying?
- Has the school made changes to the locations to minimize bullying opportunities?
- What are the consequences for bullying at the school? Are they applied consistently?
- Does a member of the school staff meet with students who bully their peers to reinforce school rules against bullying, administer appropriate consequences for bullying behaviors, and make them aware that future behaviors will be closely monitored?
- Does the bullying stop as a result of the meeting between the student and the staff member? How is this determined?
Victims and Victimization

- Does the school know all the victims of bullying?
- How does the school identify victims? Given that most victims and witnesses do not report bullying, is the current system for identifying victims adequate? Who are the chronic victims? What has the school done to protect them?
- What are the most common forms of bullying victimization?
- Does the school policy address them?
- Does the school have a policy regarding the role of bystanders in reporting bullying? If so, is the policy adequate?

Source: Adapted from Sampson (2009) and Office of Safe and Drug-Free Schools, U.S. Department of Education (n.d.). From Assessment of Children (New edition, forthcoming, copyright pending). Permission to photocopy this table is granted to individuals who attended Academy for IDEA ALDs and HOs, Seattle University, School of Law, March 21, 2011, San Diego, CA.
Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973 (Section 504); and Title II of the Americans with Disabilities Act of 1990 (Title II). Section 504 and Title II prohibit discrimination on the basis of disability. School districts may violate these civil rights statutes and the Department’s implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees. School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil laws.

---

2. 20 U.S.C. § 1608 et seq.
6. The Department’s regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106. Under these federal civil rights laws and regulations, students are protected from harassment by school employees, other students, and third parties. This guidance focuses on peer harassment, and articulates the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.
rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools. And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known. In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school’s investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

---

7 For instance, the U.S. Department of Justice (DOJ) has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (Title IV), which prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. State laws also provide additional civil rights protections, so districts should review these statutes to determine what protections they afford (e.g., some state laws specifically prohibit discrimination on the basis of sexual orientation).

8 Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment’s application to harassment, see the discussion in OCR’s Dear Colleague Letter: First Amendment (July 18, 2005), available at http://www2.ed.gov/about/offices/list/ocr/firstamend.html, and OCR’s Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 18, 2001) (Sexual Harassment Guidance), available at http://www2.ed.gov/about/offices/list/ocr/docs/3rdparties.html.

9 A school has notice of harassment if a responsible employee knows, or in the exercise of reasonable care should have known, about the harassment. For a discussion of what a “responsible employee” is, see OCR’s Sexual Harassment Guidance.

10 Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex and disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of sex or disability. See 28 C.F.R. § 35.106; 28 C.F.R. § 35.107(b); 34 C.F.R. § 304.7(b); 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8; 34 C.F.R. § 106.8(b); 34 C.F.R. § 106.9.
environment and its effects, and prevent the harassment from recurring. These duties are a school’s responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target’s educational program (e.g., not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district’s Title IX and Section 504/Title II coordinators.\(^{11}\)

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school’s responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.

- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school’s responsibility is to eliminate the

\(^{11}\) Districts must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment. See 28 C.F.R. § 35.107(a); 34 C.F.R. § 104.7(a); 34 C.F.R. § 106.8(a).
Dear Colleague Letter: Harassment and Bullying

- Sexual Harassment Guidance (Revised 2001):
  http://www.ed.gov/about/offices/list/ocr/docs/shguide.html

  http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html

- Racial Incidents and Harassment Against Students (1994):
  http://www.ed.gov/about/offices/list/ocr/docs/race94.html

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

OCR is committed to working with schools, students, students’ families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assistance in your efforts to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit:

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America’s students.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights
Dear Colleague Letter: Harassment and Bullying

hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school’s failure to recognize student misconduct as discriminatory harassment violates students’ civil rights. In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

**Title VI: Race, Color, or National Origin Harassment**

- Some students anonymously inserted offensive notes into African-American students’ lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school’s racial groups.

In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (e.g., racial slurs) and also targeted students on the basis of their race (e.g., notes directed at African-American students). The nature of the harassment, the number of incidents, and the students’ safety concerns demonstrate that there was a racially hostile environment that interfered with the students’ ability to participate in the school’s education programs and activities.

Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school’s policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately

---

12 Each of these hypothetical examples contains elements taken from actual cases.
and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.\textsuperscript{13}

- **Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth graders trying to force two seventh graders to give them money. The ninth-graders told the seventh-graders, “You Jews have all of the money, give us some.” When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student “Drew the dirty Jew.” The responsible eighth-graders were reprimanded for teasing the Jewish student.**

The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion,\textsuperscript{14} groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school’s Title VI responsibilities when the harassment is based on the group’s actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members’ religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.\textsuperscript{15}

In this example, school administrators should have recognized that the harassment was based on the students’ actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students’ religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school’s.

\textsuperscript{12} More information about the applicable legal standards and OCR’s approach to investigating allegations of harassment on the basis of race, color, or national origin is included in Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 448 (Mar. 10, 1994), available at http://www.ed.gov/about/offices/list/ocr/regs04.html.

\textsuperscript{13} As noted in footnote seven, OCR has the authority to remedy discrimination based solely on religion under Title IV.

\textsuperscript{14} More information about the applicable legal standards and OCR’s approach to investigating complaints of discrimination against members of religious groups is included in OCR’s Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 15, 2004), available at http://www2.ed.gov/about/offices/list/ocr/religious-rights04.html.
education programs and activities (e.g., by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school’s response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school’s responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents “teasing” is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school’s policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school’s response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

**Title IX: Sexual Harassment**

- Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student’s teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as “hazing” that new students often experience. They also noticed the new student’s anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.

Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.
Page 7- Dear Colleague Letter: Harassment and Bullying

In this example, the school employees failed to recognize that the “hazing” constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (e.g., sexual rumors and name calling), and sufficiently serious that it limited the student’s ability to participate in and benefit from the school’s education program (e.g., anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school’s policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district’s Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.\(^\text{18}\)

**Title IX: Gender-Based Harassment**

- *Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). As a result, the student dropped out of the drama club to avoid further harassment. Based on the student’s self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.*

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—i.e., even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their

---

\(^{18}\) More information about the applicable legal standards and OCR’s approach to investigating allegations of sexual harassment is included in OCR’s Sexual Harassment Guidelines, available at [http://www2.ed.gov/about/offices/list/ocr/docs/dhguide.html](http://www2.ed.gov/about/offices/list/ocr/docs/dhguide.html).
Dear Colleague Letter: Harassment and Bullying

sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target’s actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student’s failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student’s ability to participate in the school’s education program (e.g., access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an ad hoc basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student’s teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school’s harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.

Section 504 and Title II: Disability Harassment

- Several classmates repeatedly called a student with a learning disability “stupid,” “idiot,” and “retard” while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a

---

17 Guidance on gender-based harassment is also included in OCR’s Sexual Harassment Guidance, available at http://www.ed.gov/about/offices/list/ocr/docs/guidance.html.
Page 9- Dear Colleague Letter: Harassment and Bullying

psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student’s disability, and limited the student’s ability to benefit fully from the school’s education program (e.g., absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district’s Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.18

I encourage you to reevaluate the policies and practices your school uses to address bullying19 and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- Sexual Harassment: It’s Not Academic (Revised 2008): http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html

18 More information about the applicable legal standards and OCR’s approach to investigating allegations of disability harassment is included in OCR’s Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2008), available at http://www2.ed.gov/about/offices/list/ocr/docs/guidance-disabilityharass.html.
19 For resources on preventing and addressing bullying, please visit http://www.bullying.org, a Web site established by a federal Interagency Working Group on Youth Programs. For information on the Department’s bullying prevention resources, please visit the Office of Safe and Drug-Free Schools’ Web site at http://www.ed.gov/offices/OSS/2013.
For information on regional Equity Assistance Centers that assist schools in developing and implementing policies and practices to address issues regarding race, sex, or national origin discrimination, please visit http://www.ed.gov/programs/equivcenter.
HIGHLIGHTS OF THE MASSACHUSETTS LAW ON BULLYING
AN ACT RELATIVE TO BULLYING IN SCHOOLS

Definitions

Bullying. “Bullying,” the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that:

i. causes physical or emotional harm to the victim or damage to the victim’s property
ii. places the victim in reasonable fear of harm to himself or of damage to his property
iii. creates a hostile environment at school for the victim
iv. infringes on the rights of the victim at school
v. materially and substantially disrupts the education process or the orderly operation of a school.

For the purposes of this section, bullying shall include cyber-bullying.

Cyber-bullying. “Cyber-bullying,” bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include:

i. the creation of a web page or blog in which the creator assumes the identity of another person
ii. the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

Bullying Prohibitions

Bullying shall be prohibited:

i. on school grounds, property immediately adjacent to school grounds, at a school-sponsored or school-related activity, function or program whether on or off school grounds, at a school bus stop, on a school bus or other vehicle owned, leased or used by a school district or school, or through the use of technology or an electronic device owned, leased or used by a school district or school
ii. at a location, activity, function or program that is not school-related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.

Nothing contained herein shall require schools to staff any non-school related activities, functions, or programs.
Retaliation against a person who reports bullying, provides information during an investigation of bullying, or witnesses or has reliable information about bullying shall be prohibited.

Bullying Prevention Plan
Each school district, charter school, approved private day or residential school and collaborative school shall provide age-appropriate instruction on bullying prevention in each grade that is incorporated into the curriculum of the school district or school. The curriculum shall be evidence-based.

Contents of plan. Each school district, charter school, non-public school, approved private day or residential school and collaborative school shall develop, adhere to and update a plan to address bullying prevention and intervention in consultation with teachers, school staff, professional support personnel, school volunteers, administrators, community representatives, local law enforcement agencies, students, parents and guardians. The consultation shall include, but not be limited to, notice and a public comment period; provided, however, that a non-public school shall only be required to give notice to and provide a comment period for families that have a child attending the school. The plan shall be updated at least biennially.

Each plan shall include, but not be limited to:

i. descriptions of and statements prohibiting bullying, cyber-bullying and retaliation
ii. clear procedures for students, staff, parents, guardians and others to report bullying or retaliation
iii. a provision that reports of bullying or retaliation may be made anonymously; provided, however, that no disciplinary action shall be taken against a student solely on the basis of an anonymous report
iv. clear procedures for promptly responding to and investigating reports of bullying or retaliation
v. the range of disciplinary actions that may be taken against a perpetrator for bullying or retaliation; provided, however, that the disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior
vi. clear procedures for restoring a sense of safety for a victim and assessing that victim’s needs for protection
vii. strategies for protecting from bullying or retaliation a person who reports bullying, provides information during an investigation of bullying or witnesses or has reliable information about an act of bullying
viii. procedures consistent with state and federal law for promptly notifying the parents or guardians of a victim and a perpetrator; provided, further, that the parents or guardians of a victim shall also be notified of the action taken to prevent any further acts of bullying or retaliation; and provided, further, that the procedures shall provide for immediate notification pursuant to regulations promulgated under this subsection by the principal or person who holds a comparable role to the local law enforcement agency when criminal charges may be pursued against the perpetrator
ix. a provision that a student who knowingly makes a false accusation of bullying or retaliation shall be subject to disciplinary action
x. a strategy for providing counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of said students.

The plan shall afford all students the same protection regardless of their status under the law.

Ongoing professional development. The plan for a school district, charter school, approved private day or residential school and collaborative school shall include a provision for ongoing professional development to build the skills of all staff members, including, but not limited to, educators, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to
extracurricular activities and paraprofessionals, to prevent, identify and respond to bullying. The content of such professional development shall include, but not be limited to:

i. developmentally appropriate strategies to prevent bullying incidents
ii. developmentally appropriate strategies for immediate, effective interventions to stop bullying incidents
iii. information regarding the complex interaction and power differential that can take place between and among a perpetrator, victim and witnesses to the bullying
iv. research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment
v. information on the incidence and nature of cyber-bullying
vi. internet safety issues as they relate to cyber-bullying.

Informing parents and guardians. The plan shall include provisions for informing parents and guardians about the bullying prevention curriculum of the school district or school and shall include, but not be limited to:

i. how parents and guardians can reinforce the curriculum at home and support the school district or school plan
ii. the dynamics of bullying
iii. online safety and cyber-bullying.

Each school district, charter school, non-public school, approved private day or residential school and collaborative school shall provide to students and parents or guardians, in age-appropriate terms and in the languages which are most prevalent among the students, parents or guardians, annual written notice of the relevant student-related sections of the plan.

Posting plan on website. The plan shall be posted on the website of each school district, charter school, non-public school, approved private day or residential school and collaborative school.

Responsible individual. Each school principal or the person who holds a comparable position shall be responsible for the implementation and oversight of the plan at his school.

Reporting Incidents of Bullying
A member of a school staff, including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional, shall immediately report any instance of bullying or retaliation the staff member has witnessed or become aware of to the principal or to the school official identified in the plan as responsible for receiving such reports or both. Upon receipt of such a report, the school principal or a designee shall promptly conduct an investigation. If the school principal or a designee determines that bullying or retaliation has occurred, the school principal or designee shall

i. notify the local law enforcement agency if the school principal or designee believes that criminal charges may be pursued against a perpetrator
ii. take appropriate disciplinary action
iii. notify the parents or guardians of a perpetrator
iv. notify the parents or guardians of the victim, and to the extent consistent with state and federal law, notify them of the action taken to prevent any further acts of bullying or retaliation.
Internet Safety
Every public school providing computer access to students shall have a policy regarding internet safety measures to protect students from inappropriate subject matter and materials that can be accessed via the internet and shall notify the parents or guardians of all students attending the school of the policy. The policy and any standards and rules enforcing the policy shall be prescribed by the school committee in conjunction with the superintendent or the board of trustees of a commonwealth charter school.

IEP
Whenever the evaluation of the Individualized Education Program team indicates that the child has a disability that affects social skills development or that the child is vulnerable to bullying, harassment or teasing because of the child’s disability, the Individualized Education Program shall address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing.

Malicious Acts
Whoever (1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than $1,000, or imprisonment in the house of correction for not more than 2 ½ years or by both such fine and imprisonment. The conduct, acts or threats described in this subsection shall include, but not be limited to, conduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.

Harassment by Telephone
Whoever telephones another person or contacts another person by electronic communication, or causes a person to be telephoned or contacted by electronic communication, repeatedly, for the sole purpose of harassing, annoying or molesting the person or the person’s family, whether or not conversation ensues, or whoever telephones or contacts a person repeatedly by electronic communication and uses indecent or obscene language to the person, shall be punished by a fine of not more than $500 or by imprisonment for not more than 3 months, or by both such a fine and imprisonment.

For purposes of this section, “electronic communication” shall include, but not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system.

Source: Adapted from Commonwealth of Massachusetts (2010).
### Handout 7
Three Types of Bullying with Respect to Violating the Law

<table>
<thead>
<tr>
<th>Physical Bullying</th>
<th>Emotional Bullying</th>
<th>Social Bullying</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Harm to someone’s body or property)</td>
<td>(Harm to someone’s self-esteem or feelings of safety)</td>
<td>(Harm to someone’s group acceptance)</td>
</tr>
<tr>
<td>Verbal</td>
<td>Nonverbal</td>
<td>Verbal</td>
</tr>
</tbody>
</table>

#### Level One (Not considered to violate the law)
- Expressing physical superiority
- Blaming the victim for starting the conflict
- Insulting remarks
- Calling names
- Teasing about possessions, clothes, physical appearance
- Giving dirty looks
- Holding nose or other insulting gestures
- Gossiping
- Starting or spreading rumors
- Teasing publicly about clothes, looks, relationships with boys or girls
- Ignoring someone and excluding him or her from a group

#### Level Two (Some of these behaviors may be against the law)
- Threatening physical harm
- Damaging property
- Stealing
- Starting fights
- Scratching or biting
- Pushing, tripping, or causing a fall
- Assaulting
- Insulting family
- Making harassing phone calls
- Insulting someone’s size, intelligence, athletic ability, race, color, religion, ethnicity, gender, disability, or sexual orientation
- Defacing school work or other personal property, such as clothing, locker, or books
- Saying someone is related to a person considered an enemy of this country (e.g., Osama bin Laden)
- Voyerism
- Ostracizing using notes, instant messaging, or e-mail
- Posting slander in public places (such as writing derogatory comments about someone in the school bathroom)
- Playing mean tricks to embarrass someone

#### Level Three (Most of these behaviors are against the law)
- Making repeated and/or graphic threats (harassing)
- Practicing extortion (such as taking lunch money)
- Threatening to keep someone silent: “If you tell, it will be a lot worse!”
- Engaging in unwanted sexual contact
- Harassing someone because of bias against his or her ethnicity, color, religion, gender, disability, or sexual orientation
- Destroying personal property, such as clothing, books, jewelry
- Writing graffiti with bias against someone’s ethnicity, color, religion, gender, disability, or sexual orientation
- Exhibitionism
- Enforcing total group exclusion against someone by threatening others if they don’t comply
- Arranging public humiliation

Note. Only some examples of bullying behaviors are shown in this handout.
Source: Adapted from New Jersey Cares About Bullying, Office of Bias Crime and Community Relations (n.d.)
References


2011 Special Education Hearing Officer & Mediator Training


White House To Host Conference on Bullying Prevention

On March 10, 2011, President Obama, the U.S. Department of Education, and the U.S. Department of Health and Human Services will host a conference on bullying prevention at the White House. The conference will bring together students, parents, and teachers to discuss how communities can work together to address bullying.

A live stream of the conference may be viewed online.

Resources:

To see the live stream of the conference, go to http://www.whitehouse.gov/live.

To find out more about bullying prevention, go to http://bullyinginfo.org.
Session 2

Mary Schwartz
Impartial Hearing Officer, Illinois

The Nexus Between the DSM & IDEA: Social Maladjustment v. Emotional Disturbance
LIST OF CASE AUTHORITY

OSEP

Letter to McNulty, 213 IDELR 108 (OSEP 1987): “It is entirely possible for a child to have a serious mental illness resulting in dangerous behavior and/or institutionalization and at the same time have that child making educational progress in an educational program without special education services.”

Letter to Woodson, 213 IDELR 224 (OSEP 1989): Law neither requires nor precludes application of DSM, which may assist in evaluating and diagnosing, especially for ED; addiction is not handicapping condition but child who is addicted may qualify for ED if he fits one or more of definitions

Letter to Anonymous, 213 IDELR 247 (OSEP 1989): fact that student has turbulent relationship with parents or engages in problematic behaviors does not by itself qualify student as ED

Letter to Peschel, 17 IDELR 178 (OSEP 1990): request to add category of biologically based brain disease, such as schizophrenia, bipolar OCD, ADHD; this is implementation issue, not definition issue – focus should be on identification and service delivery

Letter to Zirkel, 22 IDELR 667 (OCR 1995): student who uses illegal drugs is not considered “qualified individual with a disability” under the ADA or Section 504

Letter to Coe, 32 IDELR 204 (OSEP 1999): DSM-IV not synonymous with criteria for determining IDEA eligibility

Letter to Williams, 33 IDELR 249 (OSEP 2006): eligibility of child with Asperger's must be made on individual basis in light of child’s unique needs; entitled to FAPE, not particular label, with services based on child’s needs not disability category

Letter to Clarke, 48 IDELR 77 OSEP 2007): educational performance is not limited to academic performance and whether a child's disability adversely affects her educational performance must be determined on an individual basis, depending on child’s unique needs

71 Fed. Reg. 46,550 (2006): because there is “no consensus” on definition of socially maladjusted, DOE does not add definition to 2006 IDEA
JUDICIAL AND ADMINISTRATIVE DECISIONS

EMOTIONAL DISORDER/SOCIAL MALADJUSTMENT

Springer v. Fairfax County School Board, 134 F.3d 659, 27 IDELR 367 (4th Cir. 1998): upheld district court decision that student, who had no academic or behavioral problems prior to 11th grade, was socially maladjusted where professionals consistently diagnosed him with conduct disorder and stated he understood societal expectations but chose to ignore them

Johnson v. Metro Davidson County School System, 108 F. Supp.2d 906, 33 IDELR 59 (M.D. Tenn. 2000): court admitted additional evidence for narrow purpose of determining if student was disabled at time of dph, at which ALJ had found student ineligible; court found there was substantial disagreement among professionals who evaluated and treated student but evidence showed diagnosis of bipolar disorder that, combined with inappropriate behaviors, was sufficient to show inappropriate behavior under normal circumstances and also found adverse impact since student was unable to remain in school due to expulsion

R.B. v. Napa Valley Unified School District, 496 F.3d 932, 48 IDELR 60 (9th Cir. 2007): court affirmed district court determination that student was not ED eligible, finding student did not meet ED criteria as they were not to marked degree, over long period to time, and did not cause adverse impact

City of Chicago Public Schools District 299, 108 LRP 38519 (Ill. SEA 2007): student found eligible as ED where evidence showed that trauma led to psychological problems that were basis of truancy, and was truancy directly related to student’s inability to make educational progress and prevented student from receiving educational benefit

R.B. v. Napa Valley Unified School District, 496 F.3d 932, 48 IDELR 60 (9th Cir. 2007): court affirmed district court decision that student not ED eligible where student’s physically aggressive behaviors did not meet standard of marked degree, over long period of time; also no adverse impact as she did well academically

Mr. & Mrs. N.C. v. Bedford Central School District, 300 F. App’x 11, 51 IDELR 149 (2nd Cir. 2008): affirmed district court decision that student was socially maladjusted and problems resulted from drug use; also insufficient evidence of adverse impact as student did not fail any classes and had only small decline in GPA

Torrance Unified School District v. E.M., 51 IDELR 11 (C.D. Ca. 2008): court upheld ALJ’s determination of ED based on inappropriate behavior/feelings, finding that her reactions to everyday occurrences were inappropriate when compared to how her peers would react and that she had had such problems since kindergarten, had been in multiple treatments, and district had tried various interventions; statute does not require bizarre, psychotic or
delusional behavior – behavior that is potentially or actually harmful to student or others qualifies

St. Joseph-Ogden Community High School District 305 v. Janet W., 49 IDELR 125 (C.D. Ill. 2008): court reversed IHO’s determination was ED, finding that student’s emotional problems resolved by time of hearing and student’s drug use and aggressive behaviors were signs of social maladjustment rather than ED

Eschenasy ex rel. Eschenasy v. New York City Department of Education and City of New York, 604 F. Supp. 2d 639, 52 IDELR 66 (S.D. N.Y. 2009): court reversed SRO decision that student was not ED eligible, finding that although student had conduct disorder, she also showed inappropriate behaviors of cutting self, hair pulling, and suicide attempts and pervasive mood of unhappiness or depression as she was diagnosed with mood disorder, had attempted suicide, and was on medication; adverse impact shown by failing many courses, repeated suspensions and expulsions, need for summer school and tutors; court also considered evidence that she did better in setting where her ED was addressed clinically, which supports finding of ED rather than social maladjustment

R.C. & E.P. v. York School District, 51 IDELR 68 (Me. 2008): although student showed pervasive depression to marked degree, there was no adverse impact as she had good attendance and good grades, both academically and behaviorally

Student with Disability, 52 IDELR 276 (N.Y SEA 2009): SRO reversed finding of ED eligibility, where district psychologist testified that student had conduct disorder and behavior was willful, private report said student’s reality testing was intact and student knew right from wrong; also no adverse impact as student’s performance was always inconsistent and failures due to truancy, drugs, alcohol, and delinquent behavior

Hansen ex rel. J.H. v. Republic Hill School District, 56 IDELR 2 (8th Cir. 2011): affirmed district court determination of ED eligibility where student was diagnosed with conduct disorder, bipolar disorder and ADHD; evidence showed he had numerous disciplinary referrals for over 4 years for aggressive behaviors, school based mental health clinician said he was socially unsuccessful due to limited social skills; adverse impact shown as he struggled to pass classes, failed standardized tests and suffered academically because of bipolar disorder

ADVERSE IMPACT/ EDUCATIONAL PERFORMANCE/NEED FOR SPECIAL EDUCATION

Muller v. Committee on Special Education of E. Islip Union Free School District 145, 145 F.3d 95 (2nd Cir. 1998): affirmed district court decision that student was ED eligible as she had pervasive mood of depression/unhappiness and inappropriate behaviors that combined were more than conduct disorder and evidence showed that student’s performance improved in settings in which her emotional problems were clinically addressed
Mr. I. and Mrs. I. v. Maine School Administrative District No. 55, 47 IDELR 121 (1st Cir. 2007): educational impact is not limited to grades; no specific degree of impact required

Ashli and Gordon C. v. State of Hawaii, 47 IDELR 65 (D. Haw. 2007): adverse effect refers to student’s ability to perform in regular classroom designed for non-disabled students, taking into account student’s particular learning style without specially designed instruction; differentiated instruction that allows student to perform within his ability at average level permitted

Board of Education of Montgomery County, Maryland v. S.G., 230 Fed. App’x 330, 47 IDELR 285 (4th Cir. 2007): affirmed district court determination that student diagnosed with schizophrenia was ED eligible and disability had adverse impact - grades were not representative of student’s true performance as based only on work completed, teacher said student was “dazed, answered with monosyllables, withdrawn, trouble staying organized”

Board of Education of the East Islip Union Free School District, 47 IDELR 210 (N.Y. SEA 2007), aff’m 53 IDELR 327: no adverse impact found where student with Asperger’s and ADHD was in regular education kindergarten, performed very will in class, had excellent work habits and easily transitioned from task to task; although he had inappropriate behaviors, other students also exhibited those behaviors and teacher was able to manage behaviors in classroom

N.G. v. District of Columbia, 556 F. Supp.2d 11, 108 LRP 19551 (D.C. 2008): after finding student eligible as ED, court held that proper analysis for determining whether her disability had adverse impact on her educational performance required examination of private school program in which she succeeded academically; program was small, highly structured, provided high level of direction and supervision, access to crisis counseling, ongoing psychological services, and medication management and thus was essentially special education program – without these supports, student’s disability would have had adverse impact on educational performance

C.B. v. Department of Education of the City of New York, 322 F. App’x 20, 52 IDELR 121 (2nd Cir. 2009): affirmed district court decision that because student performed well academically both before and after diagnoses of bipolar disorder and ADHD, there was insufficient evidence of adverse impact

Loch v. Edwardsville School District No. 7, 327 F. App’x 647, 52 IDELR 244 (7th Cir. 2009), cert. denied, 130 S.Ct. 90 (2010): upheld finding that there was no adverse impact where student’s grades were satisfactory until she stopped attending high school and no medical evidence supported statements that she did not attend because of anxiety or diabetes

W.H. by B.H. and K.H. v. Clovis Unified School District, 52 IDELR 258 (E.D. Ca. 2009): court disagreed with ALJ’s conclusion that student did not need special education because he was progressing in general education classroom; court found student not making academic
progress as his inflated grades and test scores were inaccurate assessment of achievement, resulted from accommodations such as having student write less, not do repetitive work, and having reduced amount of work

Maus ex rel K.M. v. Wappingers Central School District, 54 IDELR 10 (S.D.N.Y. 2010): court upheld SRO determination that student with diagnoses of Asperger’s, ADHD, dysgraphia not eligible as OHI or ED where she excelled academically and social/emotional problems did not affect her academic performance

Marshall Joint School District No. 2 v. C.D., 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010): question is not whether disability in abstract could adversely affect student’s educational performance but whether in reality it does so

Nguyen v. District of Columbia, 681 F. Supp. 2d 49, 54 IDELR 18 (D.C. 2010): despite diagnoses of ADHD and major depression and hospitalization, student not eligible as ED or SLD where there was no direct link between depression and poor performance, which was likely due to attendance and drug problems, not impact of disabilities

ED and MDR

A.E. v. Independent School District No. 25 of Adair County, Oklahoma, 936 F.2d 422, 17 IDELR 950 (10th Cir. 1991): upheld district court determination that student’s behavior was sign of social maladjustment, not ED, where student had problems with peer interaction, impulse control, and anxiety and was suspended for theft, fighting, tardiness, smoking, class disruption, and improper language and IEP addressed SLD and behavior problems

Bessemer City Board of Education, 19 IDELR 652 (Ala. SEA 1992): state defines social maladjustment as “inability to adjust to the expected norms of society, which adversely affects the student’s educational performance”; student was expelled for fighting, IHO found no consistent pattern of inappropriate behavior as student had years without behavior problems and teacher said he was lazy and unmotivated but not behavior problem, was generally able to conform; student testified and was polite, responsive

Richland School District v. Thomas P., 32 IDELR 233 (W.D. Wis. 2000): court held it was not improper for ALJ to consider evidence of student’s ADD and mood disorder even though these were diagnosed after MDR; express terms of statute do not limit consideration by team only to disability identified by the district and MDR is “by its very nature retrospective” as it looks back at disability to determine if it impaired student’s ability to understand and control behavior; evidence showed that undiagnosed ADD and dysthymic disorder impacted the student’s educational performance and had direct relationship to conduct

Swanssea Public Schools, 47 IDELR 278 (Mass. SEA 2007): behavior of student with ADHD, SLD, ODD found to have direct and substantial relationship to his disability where student
left class after altercation with teacher, tried to call parent from cellphone and then became increasingly threatening and potentially dangerous to assistant principal who interfered and tried to take cellphone; expert testified that student was unaware of escalation, impulsiveness, and not capable of self-regulation at that point; good comparison of expert testimony

Fulton County South Dakota, 49 IDELR 30 (Ga. SEA 2007): where student had threatened to kill teacher and self and was IDEA eligible as OHI, ALJ found that district had not considered all relevant information in student’s file, including diagnosis of oppositional defiant disorder at MDR and notation in IEP that “OHI/emotional/behavioral disorder primary” not considered even though it impeded his learning and that of others; because evidence was improperly excluded, district ordered to hold new MDR

In re: Student with a Disability, 51 IDELR 231 (Va. SEA 2008): student’s behavior on bus, which included verbally and physically attacking another student, was premeditated and thus not related to his disability

Manteca Unified School District, 50 IDELR 298 (Cal. SEA 2008): ALJ found substantial and direct relationship between student’s conduct of kicking another student in groin and her disability of PTSD due to sexual assault; her psychiatrist testified that she had outbursts when confronted by something symbolic of trauma and was hypervigilant, unable to regulate emotions whereas district neuropsychologist had never met, assessed, or treated student

Fitzgerald v. Fairfax County School Board, 556 F. Supp.2d 543, 50 IDELR 165 (E.D. Va. 2008): where student’s IEP noted that he could be drawn into inappropriate behavior, court found behavior not manifestation of his disability where he played predominant role in planning, executing paintball incident in which group of students had drive-by shooting of school with paintball guns, driving by three times and shooting windows, cars, busses on school property

In re: Student with a Disability, 53 IDELR 339 (N.Y. SEA 2009): where student’s testimony at expulsion hearing showed that he was able to identify stressors and could control behavior at work and parent said he was generally happy and performed well academically, ALJ found student did not meet ED criteria and had no need for special education

In re: Student with a Disability, 53 IDELR 173 (Wis. SEA 2009): student’s behavior of vandalizing principal’s home over the summer with three other boys found to directly related to his disability where behavior occurred exactly one year after his older brother’s suicide on the front lawn of their home and student had diagnosis of PTSD and MDR/IEP team did not consider all relevant evidence and some evidence considered conflicted with other evidence considered by team
Poway Unified School District, 55 IDELR 152 (Cal. SEA 2010): where student made dry ice bomb at school, hid it in bathroom where it later exploded and hit teacher in eye, behaviors found not manifestation of ADHD as behaviors in question took place over course of days/hours, involved series of decisions and thus were not impulsive

**RESIDENTIAL PLACEMENT ISSUES**

Dale M. v. Board of Education of Bradley-Bourbonnais High School District 37, 237 F.3d 813, 33 IDELR 266 (7th Cir. 2001): court held that student’s serious discipline problems including truancy, class disruption, use of alcohol and illegal drugs, residential burglary were due to lack of proper socialization and were not primarily educational and denied parents’ request for residential placement as the only service it offered was confinement, which is not a related service; dissent opined that student’s problems impacted his education and majority had found him “a delinquent deserving of punishment, not education”

Independent School District No. 284, Wayzatata Area Schools v. A.C., 258 F.3d 769, 35 IDELR 59 (8th Cir 2001): court held that student’s lack of self-control could be traced to her early experiences and she needed residential placement to integrate her problems with truancy and classroom disruption into her overall special education program

**EXPERT WITNESS TESTIMONY**

Jaffness v. Council Rock, South Dakota (2006): DSM used to discount testimony as DSM does not include nonverbal learning disability and experts did not look at student’s school work as required by DSM

Swanssea Public Schools, 47 IDELR 278 (Mass. SEA 2007): good comparison of expert testimony

Chariho School District, 52 IDELR 57 (R.I. SEA 2009): IHO found district psychologist not sufficiently knowledgeable of student where neither observations nor evaluation put into writing

**CAUTIONARY NOTE**

School District of Wisconsin Dells v. Z.S. and Littlegeorge, 184 F. Supp. 2d 860, 35 IDELR 157 (W.D. Wis. 2001): ALJ bifurcated hearing and spent two days determining proper identification of disability, concluding that autism is synonymous with PDD-NOS; court found this was not consistent with evidence, did not comport with DSM-IV directives and ALJ’s determination that student fit legal definition of autism “exceeded the bounds of his authority, knowledge and experience; he is not equipped to make a finding no doctor has ever made”

Excellent book on cultural mental health: The Spirit Catches You and You Fall Down by Anne Fadiman
### Children’s GAF Scale

100-point rating scale measuring psychological, social and school functioning for children aged 6-17. It was adapted from the Adult Global Assessment Scale and is a valid and reliable tool for rating a child's general level of functioning on a health-illness continuum.

<table>
<thead>
<tr>
<th>GAF Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>100-91</td>
<td><strong>Superior functioning</strong> in all areas (at home, at school and with peers), involved in a range or activities and has many interests (e.g., has hobbies or participates in extracurricular activities or belongs to an organized group such as Scouts, etc.). Likable, confident, &quot;everyday&quot; worries never get out of hand. Doing well in school, no symptoms.</td>
</tr>
<tr>
<td>90-81</td>
<td><strong>Good functioning in all areas.</strong> Secure in family, school and with peers. There may be transient difficulties and &quot;everyday&quot; worries that occasionally get out of hand (e.g. mild anxiety associated with an important exam, occasional &quot;blow ups&quot; with siblings, parents or peers).</td>
</tr>
<tr>
<td>80-71</td>
<td><strong>No more than slight impairment in functioning</strong> at home, at school, or with peers. Some disturbance of behavior or emotional distress may be present in response to life stresses (e.g., parental separations, deaths, births of a sib) but these are brief and interference with functioning is transient. Such children are only minimally disturbing to others who are not considered deviant by those who know them.</td>
</tr>
<tr>
<td>70-61</td>
<td><strong>Some difficulty in a single area, but generally functioning pretty well</strong> (e.g., sporadic or isolated antisocial acts, such as occasionally playing hookey or petty theft; consistent minor difficulties with school work, mood changes of brief duration; fears and anxieties which do not lead to gross avoidance behavior; self doubts). Has some meaningful interpersonal relationships. Most people who do not know the child well would not consider him/her deviant but those who do know him/her well might express concern.</td>
</tr>
<tr>
<td>60-51</td>
<td><strong>Variable functioning with sporadic difficulties or symptoms</strong> in several but not all social areas. Disturbance would be apparent to those who encounter the child in a dysfunctional setting or time but not those who see the child in other settings.</td>
</tr>
<tr>
<td>50-41</td>
<td><strong>Moderate degree of interference in functioning in most social areas or severe impairment of functioning in one area</strong>, such as might result from, for example, suicidal preoccupations and ruminations, school refusal and other forms of anxiety, obsessive rituals, major conversion symptoms, frequent anxiety attacks, frequent episodes of aggressive or other antisocial behavior with some preservation of meaningful social relationships.</td>
</tr>
<tr>
<td>40-31</td>
<td><strong>Major impairment in functioning in several areas and unable to function in one of these areas,</strong> i.e., disturbed at home, at school, with peers, or in the society at large, e.g., persistent aggression without clear instigation; markedly withdrawn and isolated behavior due to either mood or thought disturbance, suicidal attempts with clear lethal intent. Such children are likely to require special schooling and/or hospitalization or withdrawal from school (but this is not a sufficient criterion for inclusion in this category).</td>
</tr>
<tr>
<td>30-21</td>
<td><strong>Unable to function in almost all areas,</strong> e.g., stays at home, in ward or in bed all day without taking part in social activities OR severe impairment in reality testing OR serious impairment in communication (e.g., sometimes incoherent or inappropriate).</td>
</tr>
<tr>
<td>20-11</td>
<td><strong>Needs considerable</strong> supervision to prevent hurting other or self, e.g., frequently violent, repeated suicide attempts OR to maintain personal hygiene OR gross impairment in all forms of communication, e.g., severe abnormalities in verbal and gestural communication, marked social aloofness, stupor, etc.</td>
</tr>
<tr>
<td>10-1</td>
<td><strong>Needs constant supervision</strong> (24-hour care) due to severely aggressive or self-destructive behavior or gross impairment in reality testing, communication, cognition, affect, or personal hygiene.</td>
</tr>
</tbody>
</table>
Global Assessment of Functioning (GAF) Scale

Consider the client’s psychological, social, and occupational functioning on a hypothetical continuum (1-100) of mental health-illness. Do not include impairment in functioning due to physical (or environmental) limitations. Assessment is of client’s functioning during the previous 12 months.

CODE (Note: Use intermediate codes when appropriate, e.g. 45, 68, 72.)

91-100 Superior functioning in a wide range of activities, life’s problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No symptoms.

81-90 Absent or minimal symptoms (e.g., mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more that everyday problems or concerns (e.g., an occasional argument with family members).

71-80 If symptoms are present, they are transient and expectable reactions to psychosocial stressors (e.g., difficulty concentrating after family arguments); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork).

61-70 Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g. occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.

51-60 Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational or school functioning (e.g., few friends, conflicts with peers or co-workers).

41-50 Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

31-40 Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgement, thinking or mood (e.g., depressed person avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).

21-30 Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgement (e.g. sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home or friends).

11-20 Some danger of hurting self or others (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene (e.g. smears feces) OR gross impairment in communication (e.g., largely incoherent or mute).

1-10 Persistent danger of severely hurting self or others (e.g., recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.

0 Inadequate information.


CUCS Housing Resource Center, 198 E. 121st Street, 6th Floor, New York, NY 10035, Phone: (212) 801-3333, Fax: (212) 803-5880 (Revised 10/08)
Session 3

Prof. Elizabeth A. Francis
Judicial Studies and English
University of Nevada-Reno

How to Write Better Decisions
EFFECTIVE JUDICIAL WRITING

SAN DIEGO, CALIFORNIA

MARCH 22, 2011

PROF. ELIZABETH A. FRANCIS

THE NATIONAL JUDICIAL COLLEGE
PROBLEMS

Professor Elizabeth Francis

1. In this air crash case, involving appellant Reed's $1.2 million indemnity claim against appellee; where the principal disputed issue at the jury trial was Reed's theory that a defective valve guide in an engine supplied by appellee had fractured and flown into the turbocharger, eventually crippling the engine; and when appellee secretly conducted physical tests of that theory after the discovery cut-off, and even after the trial began, in plain violation of the pre-trial and discovery rules - was it prejudicial error to allow appellee nonetheless to report on its testing to the jury and thus dramatically, though completely unreliably, undercut Reed's central position at the trial?

2. Pursuant to the allegation of the overthrow of the position, plaintiff asserts the following facts.

3. It is the claimant's position that the denial is inappropriate. In this connection, there is an indication by the claimant that there was some delay in reporting the incident since she has a history of heart problems.

4. In an effort to objectively dispose of all counts the Court will attempt to first render its finding as to the interpretation of the Billboard Law and state the Court's findings as to the Plaintiffs and Defendant's position, on the question of sufficient service and proper service and the application of Billboard Law as it applies to location of signs in non-zoned commercial and industrial land.
APPLICATIONS

NARRATIVE AND EXPOSITORY WRITING: A CONTRAST

Opening Paragraph: Memorandum Opinion

A genuine dispute existed between the parties. Plaintiff-landlord claimed the lease ran for 18 months from April 1, 2000, to September 1, 2001. Defendant-tenant claimed it ran for one year from April 1, 2000, to March 1, 2001; the extended period to September 1, 2001, was in the nature of a five month option. Three months before April 1, 2001, the tenant gave written notice to terminate the lease on March 31, 2001. On March 28, 2001, the landlord billed the tenant not only for unpaid March rent and utility costs of $2,667.30 but also for April rent of $1,239.75 (and late payment of $123.98 for March rent late). In response the tenant submitted his payment of $2,791.28 (presumably equaling the sums of $2,667.30 plus $123.98) by check dated April 1, 2001, with the notation on its face reading, “Final payment for rent owed T.B.M. now and forever.”

Explanation of Pertinent Law

Under the Winter Wolff & Co. v. Coop Lead and Chemical Co. (111 N. W. 2d 461) line of cases enunciated in Minnesota in 1961 with Justice Knutson following the leads of Rye v. Phillips, 282 N.W. 459 and Olien v. St. Paul, 270 N.W. 1, the Minnesota Supreme Court took the essential position that whether a claim is termed “liquidated” or “unliquidated” as long as the parties agree to terminate the dispute by an offer of part payment and an acceptance of part payment as the final payment then an accord and satisfaction results. That settles the matter then without looking to additional consideration to support the compromise settlement or additional promise (whether by legal theory of "waiver" or whatever).

Opening Paragraph

The plaintiff, a teaching podiatrist, alleges that after he indicated an intention to testify as an expert witness against defendant in a medical malpractice case, inquiries were made at his deposition as to plaintiffs treatment of certain of plaintiff’s patients; that thereafter threats were made against plaintiff that if he testified as an expert witness against defendant, he (plaintiff) would be the subject of malpractice actions; that agents of defendant induced patients of plaintiff to file suit against plaintiff, that this was done to discourage future testimony by plaintiff against defendant.
APPLICATION EXERCISES

1. The aforesaid purposes allow the punishment by the court of an offending party where this serves the systemic interest in deterring future noncompliance with discovery procedures.

2. Exhaustion of administrative remedies is often required prior to pursuit of judicial relief. Strict adherence to the exhaustion of remedies doctrine is not required when it leads to results which are unduly harsh in individual cases. Exhaustion of remedies may be waived when a constitutional claim is raised.

3. When the reduction of requirements is founded not on legitimate business grounds, as in Southwest, but on the purchaser's desire of a more favorable price, courts have held the purchaser in breach of contract.

4. This prior acceptance of the company's denials thus further reinforces the parties' preexisting mutual understanding that attendance at individual worker's compensation proceedings before DILHR does not constitute "official Union business."

5. That is not to say that there is nothing in the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and there has been discussion as to the application of the statute in the special instances of such cases. No single answer has been reached.

6. As the concept of least restrictive environment presupposes a child whose non-handicapped counterpart would be a school child in a regular classroom, that concept has no application to a preschool handicapped child, whose non-handicapped counterpart needs no special attention prerequisite to the education he or she will later receive.
Effective Judicial Writing

I

The Grammar of Clarity
1. To obligate a corporation upon a contract to another party, the party must prove that the contract was its act, whether by corporate action, that of an authorized agent, or by adoption and ratification. A court will infer such ratification from the acquiescence or the acceptance of the benefits of such contract. It is essential to implied ratification that the acceptance be with knowledge of all pertinent fact.

2. This agreement shall run from May 1, 1985 to May 31, 1987, provided, however, that it may be terminated by either party without cause upon thirty days written notice to the other party. Further provided that such termination would not be effective to terminate any Advisory Agreement or any commitments made by Abco as agent. Termination of obligations under such latter Agreements or commitments will be terminated as provided in the Advisory Agreement and the commitment.

3. L will at all times use its best efforts to provide distributor and his representatives with accurate technical information, but L does not assume responsibility for products that are packaged and labeled in accordance with that information, nor shall L be deemed to have made any warranties, expressed or implied, of any nature, about technical information describing products that are packaged and labeled under this Agreement.

4. L will at all times use its best efforts to provide distributor and his representatives with accurate technical information. But L does not assume responsibility for products that are packaged and labeled in accordance with that information. Nor shall L be deemed to have made any warranties, expressed or implied, of any nature, about technical information describing products that are packaged and labeled under this Agreement.
STORYTELLING

(a). The court ordered the Board to terminate the special hiring plan: even though the State showed that the plan increased the number of qualified minority applicants, because the State failed to demonstrate any specific disparate treatment.

Characters: Actions:

___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________

Revise this passage using the noun forms of the actions rather than the verb forms.

(b) The contention that detriment suffered in the form of start-up costs constituted consideration for the oral contract is insufficient since there is no allegation of bargaining over the detriment.

Characters: Actions:

___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________
___________________  ___________________  →  ___________________

Revise this passage using the verb forms of the actions rather than the noun forms.
Note: These two principles, Subject as Character and Action as Verb, mean that Characters will appear before their Actions. But that kind of sequence also occurs with nominalizations. Distinguish between these:

In (1), the whole subject is a nominalization preceded by a character: character and action are combined into the whole subject of the sentence.

Subject                             verb
1. The Court's _______ denial of summary judgment ______ was ______ without cause.
   character                      nominalized action

In (2), the whole subject is a character, followed by a verb; character is broken out into its own subject, and action appears as a verb.

subject                    verb
2. The Court _______ denied ______ summary judgment without cause.
   character                 action

In (1), the character and action are combined into the whole subject of the sentence.

In (2), the character's broken out into its own subject, the action into a separate verb.
WHY LOOK AT NOMINALIZATION FIRST?

... because the “action-as-verb” principle has so many consequences.

- You may have been told to write specifically, concretely. When you turn verbs into nouns and delete the characters, you fill a sentence with abstract nouns:
  
  There is the probability of an affirmative decision in regard to termination of the program.

When you use subjects to name characters and verbs to name their actions, you write sentences that are more specific and concrete

Congress decided to terminate the program.

- You may have been told not to use too many prepositions.
  
  An evaluation of the program by us is planned in order to achieve greater efficiency in the servicing of clients.

When you use verbs instead of nominalizations, you eliminate prepositional phrases.

We plan to evaluate the program so that we can serve clients better.

- You may have been told to order your ideas logically. When you turn verbs into nouns and then chain them into phrases, you can confuse the logical sequence of the actions:
  
  Decisions in regard to administration of medications despite inability of irrational patients appearing in Trauma Centers to provide legal consent rest with physicians alone.

When you use subjects to name characters and verbs to name their actions, you are more likely to match your syntax to your logic.

When a patient appears in a Trauma Centers and behaves so irrationally that he cannot legally consent to treatment, only the physician can decide whether to administer medications.

- You may have been told to make those logical relationships clearer.
  
  Refusal to give guarantees in regard to scheduled debt repayment resulted in failure to reach agreement on terms, despite intensive negotiation efforts.

When you use verbs instead of nouns, you have to use more logical connectors such as because, though, and if.

Though we negotiated with Abco intensively, we could not agree on terms because Abco refused to guarantee that it would repay its debts on schedule.
EXERCISES

a. The court found that there were two independent causes of the injury, first being the driving of the vehicle off the road and the second being the filing of the trigger mechanism of the pistol.

b. An employer's mere awareness of the racially discriminatory consequences of a policy or practice does not fulfill the disparate treatment intent requirement.

c. The Court's expectation is of the establishment of a special retrieval program which will be utilized to preserve applications and permit reconsideration of the applications of Blacks and Hispanics who are generally qualified but who are not hired at the time of initial application.
RECALL NOTICE: EXERCISE

This is an excerpt from an actual automobile recall letter.

(1) A defect which involves the possible failure of a frame support plate may exist on your vehicle. This plate (front suspension pivot bar support plate) connects a portion of the front suspension to the vehicle frame, and its failure could affect vehicle directional control, particularly during heavy brake application. In addition, your vehicle may require adjustment service to the hood secondary catch system.

(7) The secondary catch may be misaligned so that the hood may not be adequately restrained to prevent hood fly-up in the event the primary latch is inadvertently left unengaged. Sudden hood fly-up beyond the secondary catch while driving could impair driver visibility. In certain circumstances, occurrence of either of the above conditions could result in vehicle crash without prior warning.
STORY STRUCTURE: TWO VERSIONS

In the following example of brief-writing, compare the difference between two different versions of the story of a fire. The first version is the letter in which the attorney asks the client insurance company to authorize a subrogation claim. Note how the author makes it clear that "C" and "D" (who are employees of the insured company) are partly responsible for the accident.

la. At approximately 3:55 o'clock a.m. on the morning of Saturday, July 30, 1983, an explosion and fire occurred at the plant in an area where railroad tank cars are loaded with vinyl chloride for shipment. The fire seriously burned C, an F employee involved in the vinyl chloride loading operation, and seriously, but less severely, burned L, a fellow employee loading caustic at a loading rack approximately 15 to 20 yards away. The fire originated at tank car ABCD 96 and spread to an adjacent car HIJK 74. Your insured suffered some $950,000.00 in damages as a result of the fire.

   The theory best supported by the physical evidence is that C mistakenly disconnected the south loading hose attached to ABCD 96 without first closing its intake valve, thus permitting vinyl chloride to escape from the tank car into the atmosphere when the tank car's excess flow valves failed to function. This theory is supported by a number of factors: List of factors.

   Recall that C relieved D who had been loading the cars with vinyl chloride. It is possible that D did not communicate with C regarding what stage of the loading procedures D had arrived at prior to the time C relieved him, or that D communicated incorrect information to C regarding what stage of the loading procedures D had arrived at prior to his relief by C.

Now compare the version of the story told in the plaintiffs brief on the claim against the manufacturer of the excess flow valves:

lb. On or about July 30, 1983, at approximately 3:55 a.m., an explosion and fire occurred at the F plant located on Road in City. The explosion and fire occurred in an area of the plant where railroad tank cars are loaded with vinyl chloride and caustic for shipment. The explosion and fire originated as tank car ABCD 96 was being prepared for transit. The loading line connected to the south angle valve of tank car ABCD 96 either ruptured or became prematurely disconnected, allowing the release of highly flammable vinyl chloride onto the loading rack area, even though the tank car was equipped with excess flow valves that were intended to prevent this type of product loss. The vinyl chloride ignited causing this explosion and fire.
PROBLEMS

1. The Colombo Court's willingness to discount the teacher's actual or implied authority over his students as insufficient to impose respondeat superior liability upon the school district is persuasive precedent that Abco, likewise, should not be held liable under this theory in the instant action.

2. There must be support for plaintiffs subjective allegations of disabling pain and symptoms by medical signs and findings which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain and symptoms alleged and would lead to the conclusion that the individual is under a disability.

3. The mere fact that a union signatory has taken a position asserting an unlawful interpretation of a clause does not make the clause unlawful unless the employer who is a signatory to the agreement accedes to the Union's unlawful construction. The General Counsel makes no contention that any unlawful interpretation placed upon the Memorandum by the Union is likewise the construction given to it by AGC. The record establishes no agreement by the Respondent AGC to any unlawful or arguably unlawful interpretations placed upon the Memorandum by the Respondent Union.

4. R's contention, which it raises in its Response, but not in its counterclaim, that the detriment it suffered in the form of start-up and promotional expenses was the consideration for the alleged oral contact is legally insufficient since there is no allegation that this alleged detriment was bargained for by both parties.
10a. This case is about the likelihood, not possibility, of confusion. Star Systems and White, Inc. have sold tens of millions of dollars of products under their trademarks, but they have never led any purchaser to believe that a TOPS LAN software system was a business form or that it originated with White. A sophisticated LAN involves a capital investment of thousands of dollars and great purchaser care. By contrast, a clerk merely replenishes printer paper at low cost as needed. The primary influence on TBF’s products is the price of paper; TOPS LANs are driven by technology. White's toy top and TOPS marks identify TBF in the office products market, and the Star's TOPS and accompanying marks identify it in the LAN market.

10b. This case is not about whether some purchaser might confuse a TOPS LAN software system with a White business form, but whether purchasers are likely to confuse them. Purchasers have bought tens of millions of dollars of both products under their different trademarks, but no one has ever confused a business form with a TOPS LAN software system, or vice versa. A purchaser of a sophisticated LAN invests thousands of dollars and, before buying, expends great care. By contrast, when a clerk wants to replenish printer paper, he buys the cheapest paper available. Purchasers of paper are concerned primarily with cost; purchasers of a TOPS LAN are concerned primarily with technology. The purchaser of paper can easily identify TBF products in the office products market by its toy top and the TOPS marks. The purchaser of a computer software system can identify Star's TOPS LAN products by its marks.
13a. A determination of involvement of lipid-linked saccarides in the assembly of the oligasaccaride chains of ovalbumin in vivo was the principal aim of this study. In vitro and in vivo studies utilizing oviduct membrane preparations and oviduct slices and the antibiotic tunicamycin were undertaken to accomplish this. The inhibition of tunicamycin on the synthesis of N-acetylglucosaminyllipid catalyzed by hen oviduct membrane preparations was confirmed by the in vitro experiments. For another monosaccharide-lipid, mannosylphosphoryldolichol, no inhibitory effect on synthesis was observed. Earlier reports on the effect of tunicamycin in other systems agree with these results.

13b. The principal aim of this study was to determine how lipid-linked saccarides are involved in the assembly of the oligasaccaride chains of ovalbumin in vivo. To accomplish this, studies were undertaken in vitro and in vivo, utilizing the anitibiotic tunicamycin on oviduct membrane preparations and oviduct slices. The in vitro experiments confirmed that tunicamycin inhibited the synthesis of N-acetylglucosaminyl-lipid catalyzed by hen oviduct membrane preparations. Tunicamycin showed no inhibitory effect on the synthesis of another monosaccharide-lipid, mannosylphosphoryldolichol. These results agree with earlier reports on the effect of tunicamycin in other systems.
14a. The equitable right of recovery offers certain advantages and flexibilities over the statutory method of recovery. Strict compliance with the statutory requirements is not necessary for recovery in equity. The particular facts of the controversy may therefore help tailor recovery, with the result that greater or lesser amounts may be recoverable. In *Wilson*, rents based upon the value of the property with the defendant's improvements thereupon were granted to plaintiff, whereas only the value of use and occupation exclusive of improvements would be recoverable in a statutory action. The evidentiary standard may also be relaxed in the equitable proceeding. In *Tyson*, mere proof of the original cost of the improvements was sufficient for the court, instead of its requiring evidence as to the amount by which the improvements had enhanced the value of the land. Most importantly, the one-year requirement of possession prior to suit does not appear to be prerequisite for recovery in equity. The standard of good faith appears the same under both remedies. A good faith belief must be based upon reasonable grounds that the improver's title was superior. The surrounding facts and circumstances are highly determinative of the question of good faith.
Even if you managed your sentences in all the ways we’ve discussed so far, you might still fall short of creating sentences that are not only clear and persuasive, but *designed* to shape belief.

18a. Jacobs entered into an agreement with Smith that stipulated that Jacobs would receive monthly payments from Smith until Jacobs' balance had fallen to 10% of the original sum.

18b. Smith agreed that he would pay Jacobs every month until he repaid Jacobs 90% of the original sum.

19a. Jacobs discussed with Smith the possibility that Jacobs would replace Smith after his retirement.

19b. Smith discussed with Jacobs the possibility that when Smith retired, he would turn over his position to Jacobs.

20a. Plaintiff had no reason to believe that Jones' payment would not be immediately forthcoming.

20b. Plaintiff had every reason to believe that Jones' payment would be immediately forthcoming.

20c. Jones gave plaintiff no reason to believe that he would withhold payment.

20d. Jones gave plaintiff every reason to believe that he would pay immediately.
Session 4

Prof. Philip T. K. Daniel
Professor of Educational Administration and
Adjunct Professor of Law
Ohio State University

FAPE, IDEA and NCLB
THE POSSIBLE INFLUENCE OF NCLB ON IDEA AND FAPE

Philip T.K. Daniel, J.D., Ed.D.
William and Marie Flesher Professor of Educational Administration
Adjunct Professor of Law, The Ohio State University, Columbus, Ohio

I. Introduction

The No Child Left Behind Act (NCLB) and its influence upon the Individuals with Disabilities Education Improvement Act (IDEA) caused researchers to question whether the provision in the IDEA governing Free Appropriate Public Education should be revised to better serve the interests of special needs children. IDEA was reauthorized and closely aligned with NCLB; NCLB specifically protects students with special needs regarding assessments, educational needs, achievement, and holding states and educational agencies accountable for the academic outcomes of all students. 20 U.S.C. § 6301 (2010). For each student protected by the IDEA, an instrument must be developed to serve the child’s unique needs, and part of this requirement is the promotion of participation in the general curriculum. As determined by Congress, standards of achievement measured by assessment instruments are cornerstones of this new approach to education. This presentation examines whether the protections of students with special needs moves beyond the “some benefit” standard as established in Board of Education of the Hendrick Hudson Central School District v. Rowley in light of the positions of the United States Department of Education both in regulations and case law.

II. Is the “Some Benefit” Standard of FAPE Evolving?

A. Free Appropriate Public Education Interpretation

IDEA’s statutory definition of FAPE has not substantively changed over time. The Court interpreted the exact same substantive definition of FAPE in Rowley—a 1982 decision—as it appears 2011. FAPE means special education and related services that:

(A) [H]ave been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

---

IDEA’s cryptic definition of FAPE resulted in the seminal Supreme Court case, *Rowley*, in which the Court used legislative history to determine the substantive educational standard disabled children are entitled to under IDEA.

 ficha


Facts:
- Deaf student in elementary school with minimal residual hearing and excellent lip-reading skills.
- Several members of administration attended course in sign language to prepare for student.
- Teletype machine was installed in administration office to communicate with parents.
- School paid for an FM hearing aid.
- Parents requested a sign-language interpreter to help student at all times in her academic classes.
- Student communicated well with classmates, had an extraordinary rapport with them, and performed better than the average child in her class, despite the fact that she understood considerably less in class because of her disability.

Legal Rules:
- “By passing the Act, Congress sought primarily to make public education available to [disabled] children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly “recognize[d] that in many instances the process of providing special education and related services to [disabled] children is not guaranteed to produce any particular outcome.” S.Rep., at 11, U.S.Code Cong. & Admin.News 1975, p. 1435. Thus, the intent of the Act was more to open the door of public education to [disabled] children on appropriate terms than to guarantee any particular level of education once inside.”

- “The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each [disabled] child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate [disabled] children, and to provide them with access to a free public education.”

- “We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”

---

3 Id. at 200.
4 Id. at 201.
• “Insofar as a State is required to provide a [disabled] child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”

*Rowley* is the only Supreme Court case that defines FAPE. Presently, it is still the primary authority to determine whether schools provide the minimum substantive educational standard guaranteed under IDEA. However, in 1988, the Third Circuit expanded the *Rowley* decision and adopted a higher standard of educational benefit.

**Third Circuit**

❖ **Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988).**

**Facts:**
• Fourteen-year-old student with encephalopathy—disease similar to cerebral palsy.
• He was diagnosed with an intellectual disability; he had the mental capacity of a toddler.
• Until 1980, school district provided student with a physical trainer, but then moved to a consultative model where the physical therapist would come once a month and work with student and instruct student’s teachers how to perform the more frequent physical therapy.
• Parents argue that student’s unique, individual needs require more direct physical therapy from a licensed therapist.
• Parents concede that student benefited to some degree from his education, but argue that student’s educational program was not appropriate because it was not individualized.

**Legal Rules:**
• “[T]he *Rowley* Court described the level of benefit conferred by the Act as ‘meaningful.’”

• “*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a ‘mainstreamed’ classroom. The Court self-consciously limited its opinion to the facts before it.” As said in *Rowley*:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a [disabled] child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

---

5 Id. at 203.
6 Polk 853 F.2d at 179 (citing Rowley, 458 U.S. at 192).
7 Id. at 180 (citing Rowley, 458 U.S. at 202).
• “We hold that the EHA calls for more than a trivial educational benefit. That holding rests on the Act and its legislative history as well as interpretation of Rowley.”

• “The EHA's sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for [disabled] children. Second, they stressed the long-term financial savings of early education and assistance for [disabled] children. A chief selling point of the Act was that although it is penny dear, it is pound wise—the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fiscally as these children grow to become productive citizens.”

• “To summarize, in our view, the danger of the district court's formulation is that under its reading of Rowley the conferral of any benefit, no matter how small, could qualify as ‘appropriate education’ under the EHA.”

❖ See also T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 577 (3rd Cir. 2000).

• A meaningful benefit “must be gauged in relation to a child’s potential.”

Despite Polk, the Third Circuit was the only circuit that exclusively applied the “meaningful benefit” standard as opposed to the “some benefit” standard attributed to Rowley. In 1997 however, the Individuals with Disabilities Education Act (IDEA) was amended. The amendments caused a ripple affect among circuits which has resulted in some circuits elevating their substantive educational standard to the “meaningful benefit” standard.


In 1994, IDEA’s purpose was described as follows:

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.


Following the 1997 amendments, IDEA’s purposes were described as follows.

8 Id. at 180.
9 Id. at 181-82.
10 Id. at 184.
The purpose of the IDEA is to ensure that:

[A]ll children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and **prepare them for further education, employment, and independent living**;

to ensure that the rights of children with disabilities and parents of such children are protected; and

to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

to ensure that **educators and parents have the necessary tools to improve educational results for children with disabilities** by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

to assess, and **ensure the effectiveness of, efforts to educate children with disabilities.**

❖ **U.S. Department of Education**

The excerpt below is an explanation from the U.S. Department of Education concerning the 1997 amendments to IDEA. The language below strongly suggests that the 1997 amendments were very significant and increased expectations for the standard of education provided under IDEA.11

**IDEA '97 - A Major Milestone.** The IDEA Amendments of 1997 (IDEA '97) represent a **major milestone in the education of children with disabilities** -- the first major revision to the Act in more than 23 years (since the enactment of P.L. 94-142, the Education of all Handicapped Children Act of 1975).

**A. BASIC RIGHTS RETAINED.**

IDEA '97 retains (and strengthens) the basic rights and protections under IDEA -- including:

---

1. the right to a free appropriate public education (FAPE) for all children with disabilities, including children suspended or expelled from school; and
2. the procedural safeguards rights for these children and their parents.

B. EMPHASIS ON IMPROVING RESULTS.

IDEA '97 provides a **new and heightened emphasis on improving educational results for children with disabilities, including provisions which ensure that these children**

1. have meaningful access to the general curriculum through improvements to the IEP, and
2. are included in general education reform efforts related to accountability and high expectations, and that focus on improved teaching and learning.

**Sixth Circuit**

- Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004).

**Facts:**
- Parents challenged IEP on grounds that it did not provide sufficient instruction in a regular classroom for their autistic child.
- Parents alleged that their child was denied FAPE in least restrictive environment and as a result, they were entitled to compensation for the private placement of their son.

**Legal Rules:**
- Sixth Circuit reviews Polk’s analysis of Rowley and agrees that Polk’s interpretation is correct. 12
- The excerpt below is the Sixth Circuit’s analysis arguing that the 1997 amendments to IDEA demonstrate that IDEA required a heightened educational standard.

The current version of the IDEA provides further support for such sentiments. Congress explicitly found that shortcomings of the previous act, the Education for all **Handicapped Children Act of 1975, included low expectations for disabled children** and “an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.” 20 U.S.C. § 1400(a)(4). Congress has declared that the school personnel who work with disabled children should receive high quality professional development in order to provide such personnel with the skills necessary to “ensure that [all disabled children] have the skills and knowledge necessary to enable them ... **to be prepared to lead productive, independent, adult lives, to the maximum extent possible.**” 20 U.S.C. § 1400(a)(5)(E). Indeed, one of the stated purposes of the IDEA is “to ensure

12 Deal, 392 F.3d at 862-63.
that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child. Indeed, states providing no more than some educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress. In evaluating whether an educational benefit is meaningful, logic dictates that the benefit “must be gauged in relation to a child's potential.” Polk, 853 F.2d at 185. Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children.13

**Ninth Circuit**

❖ **N.B. v. Hellgate Elementary School District, 541 F.3d 1202 (9th Cir. 2008).**

Facts:
- Parents argued that school district denied their child FAPE because they violated his procedural and substantive rights under IDEA.
- Parents claimed that school district failed to timely evaluate their child for autism and wrongfully denied their child an extended school year services.

Legal Rule:
- “Under the 1997 amendments to the IDEA, a school must provide a student with a ‘meaningful benefit’ in order to satisfy the substantive requirements of the IDEA. See Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir.1999) (applying the “meaningful benefit” test); see also Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 862 (6th Cir.2004).”14

❖ **Adams v. State of Oregon 195 F.3d 1141 (9th Cir.1999).**

Facts:
- Parents of autistic child sought reimbursement for expenses they incurred buying professional services beyond those offered by the State.
- Parents claimed that schools districts IEP failed to provide student FAPE.

Legal Rule:

---

13 Id. at 864.
14 Hellgate, 541 F.3d at 1212-13.
“IDEA and case law interpreting the statute do not require potential maximizing services. Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child.”  

**Second & Fifth Circuits**

Even though the Second and Fifth Circuits have both used the expression “meaningful benefit” in their decisions, they did not indicate that the term “meaningful benefit” is a standard higher than that expressed in *Rowley*. In fact, it appears as though it is applied interchangeably with the “some benefit” standard. Neither of these Circuits has cited the 1997 amendments as an indication that the standard changed.

- Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2nd Cir. 1997).

**Facts:**
- Parent sought reimbursement for expenses incurred as a result of private enrollment for child with “serious emotional disorder” because school IEP did not provide FAPE.

**Legal Rule:**
- “While the Act does not authorize a court ‘to impose a particular substantive educational standard on the state or to require equality of opportunity for the handicapped in education,’ . . . a state IEP must be reasonably calculated to provide some “meaningful” benefit. *See Rowley*, 458 U.S. at 192.”

- “[T]he district court properly concluded that even though M.M. was placed in the residential program to deal with her emotional problems and her home-life, the state had to fund the program because it was necessary for M.M. to make educational progress. The evidence shows that M.M.’s behavior was regressing and that her failure to advance academically was due primarily to her severe emotional problems, which could not be effectively dealt with outside a residential setting. In the face of M.M.’s problems, the state offered no meaningful alternative for her. Accordingly, the defendants were obliged to pay for the entire cost of the residential placement.”


**Facts:**
- Parent sought reimbursement for expenses incurred as a result of private enrollment for child with attention deficit hyperactivity disorder because school IEP did not provide FAPE.

**Legal Rules:**
- The “free appropriate public education” tailored by an ARD Committee and described in an IEP, however, need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to

---

15 Adams, 195 F.3d at 1150.
16 Milford, 103 F.3d. at 1120.
meet the child's unique needs, supported by services that will permit him “to benefit” from the instruction. In other words, the IDEA guarantees only a “basic floor of opportunity” for every disabled child, consisting of “specialized instruction and related services which are individually designed to provide educational benefit.” Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be “likely to produce progress, not regression or trivial educational advancement.” In short, the educational benefit that an IEP is designed to achieve must be “meaningful.”

- Let me emphasize the footnote. The Fifth Circuit cited Polk as an authority along with Rowley in the formation of its rule!


Facts:
- Parents of a child with Asperger's Syndrome, a form of autism, disagreed with the school district’s proposed IEP and put their child in private placement. Parents sought reimbursement for private placement alleging that district failed to provide their child with FAPE.

Legal Rule:
- “The free appropriate public education proffered in an IEP ‘need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him ‘to benefit’ from the instruction.’ The IDEA ‘guarantees only a ‘basic floor of opportunity,’ consisting of ‘specialized instruction and related services which are individually designed to provide educational benefit.’ This educational benefit ‘cannot be a mere modicum or de minimis,’ but ‘must be meaningful’ and likely to produce progress.”

- We have previously considered four factors as “indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA.” These factors are: (1) The program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key “stakeholders”; and (4) positive academic and non-academic benefits are demonstrated.

Only two Circuits, the Sixth and Ninth, have expressly acknowledged that IDEA’s 1997 and 2004 amendments modified the meaning of FAPE. The majority of the circuit courts—the First, Fourth, Seventh, Eighth, Tenth, Eleventh and District of Columbia—exclusively apply the

---

17 Cypress, 118 F.3d at 247-48 (citing Polk, 853 F.2d at 182).
18 Keller, 328 F.3d at 808-09 (quoting Bd. of Educ. v. Diamond, 808 F.2d 987, 991 (3d Cir.1986)).
19 Id. at 810.
20 Deal v. Hamilton County Board of Education, 392 F.3d 840, (6th Cir. 2004); N.B. v. Hellgate Elementary School District, 541 F.3d 1202 (9th Cir. 2008).
"some educational benefit" standard. The Supreme Court has also had occasion to review Rowley following IDEA’s 2004 amendments but did not question the Rowley standard. Nor has the Court reviewed the Rowley standard in its most recent IDEA cases. The First Circuit expressly rejected the idea that the 1997 and 2004 amendments modified the Rowley standard.

The B.’s argue that the 1997 amendments to IDEA, , changed this standard to require school districts to provide the “maximum benefit” to special needs children. They point out that the IDEA now contains legislative findings emphasizing the importance of training teachers to help special needs children “meet ..., to the maximum extent possible, those challenging expectations that have been established for all children” and prepare them to “lead productive, independent, adult lives, to the maximum extent possible.”

We do not interpret this statutory language, which simply articulates the importance of teacher training, as overruling Rowley. This court has continued to apply the Rowley standard in cases following the 1997 amendments ... as have several of our sister circuits . . . . And that is for good reason. The Rowley standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods.

One district court from the Ninth Circuit expressed doubt as to whether or not there is a difference between the “some benefit” and “meaningful benefit” standards. The court did acknowledge however that despite the differing standards, all circuits agree that IDEA “does not guarantee the absolutely best or potential-maximizing education for the individual child.” Some practitioners feel there is little substantive difference between the two standards; “they both have their roots in different parts of the Rowley decision, and there appears to be little substantive difference between the use of the two terms.”

B. No Child Left Behind and IDEA

No Child Left Behind (NCLB) introduced a national results-based education program that set forth “high standards of achievement measured by assessment instruments” to determine if students adequately progressing. Since NCLB applies to disabled students and given NCLB’s “focus on standards and educational adequacy requirements, it is argued that Rowley and the

22 Id. at 6 (citing Schaffer v. Weast, 546 U.S. 49 (2005)).
24 Lt. T.B. ex rel. N.B. v. Warwick School Committee, 361 F.3d 80, 83 (1st Cir. 2004).
26 Id. at 1207 (citations omitted).
‘some benefit’ language no longer accurately reflect the FAPE requirements of the IDEA.”

Despite this argument, courts have communally rejected the idea that NCLB affects IDEA or that FAPE’s substantive educational standard is modified as a result of NCLB.


- This case was subsequently followed in:

**Facts:**

- Disabled student’s parents challenged school district’s IEP determination that private placement was not necessary for student. Parents argued that NCLB heightened the substantive educational standard guaranteed to disabled children under IDEA.
- Parents argued that FAPE determination under IDEA depended on how well student performed on NCLB-standardized tests and that achievement standards referenced in NCLB are now incorporated into IDEA.

**Legal Rules:**

- IDEA and NCLB were enacted through Congress’ authority under the spending clause. When Congress attaches conditions to the acceptance of federal funds, the conditions must be set forth unambiguously. This is a contractual arrangement, i.e., States are only bound when they accept conditions voluntarily and knowingly.
- “The statutory language regarding the coordination of state plans clearly does not constitute an unambiguous change in the conditions imposed on recipient States by the IDEA. The NCLBA contains no specific language which purports to alter the IDEA’s FAPE and IEP requirements.”
- The fact that disabled children must be included in NCLB testing is not an unambiguous change in IDEA’s FAPE and IEP requirements. NCLB does not require FAPE determinations to be based on results of assessments.
- “Since no reasonable state official would clearly understand that, by accepting IDEA funds, a State is obligated to provide FAPE’s and IEP’s specifically designed to increase the scores of disabled children on standardized assessments mandated by the NCLBA, the Leightys' argument must fail.”

---

30 Leighty, 457 F.Supp.2d at 560.
31 Id. (quoting Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006)).
32 Id.
33 Id. at 561 (citing Kirby v. Cabell County Board of Education, 2006 U.S. Dist. 2006 WL 2691435, at 6 (S.D.W.Va.2006)).
34 Id.
35 Id. at 562.
The assessments required under the NCLBA, however, can be considered as one factor in the broader inquiry as to whether a given disabled child's education is meaningful. The Court does not mean to suggest that the results of standardized tests are irrelevant to the FAPE and IEP inquiries. "Rowley and Polk reject a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities."36


Facts:
- Parents argue that the IEP developed by school district did not provide their child FAPE and that NCLB modified interpretation of FAPE under the IDEA. Parents contended that NCLB increased the substantive standard of educational achievement under IDEA.

Legal Conclusion:
- "Given the well-established nature of the federal standard, an intent to impose an enhanced requirement for IDEA purposes would have been more clearly stated. Plaintiff has not cited any case, nor has the Court found one, which held there is a requirement in Florida that education must be maximized in the IDEA context. Holmes does not discuss the IDEA, and specifically cautions that its decision concerning the opportunity scholarship program would not necessarily affect other programs, such as those for exceptional students. Indeed, a recent Florida appellate decision continues to apply the Rowley standard, including prior Florida precedent that there is no requirement to maximize each child's potential."

See also Kirby v. Cabell County Bd. of Educ., 2006 WL 2691435 (S.D.W.Va., 2006).

Legal Conclusion:
- "The plaintiffs contend that the No Child Left Behind Act imposes additional obligations on the District in regards the level of educational benefit required by the IDEA. While the statutory language of 20 U.S.C. § 6311 requires that state plans are coordinated with the IDEA along with other programs under Title 20 . . . there is no language in the Act that places additional obligations on the development or assessment of a child's IEP. Rather, § 6311 places responsibility on the state to adopt 'challenging academic content standards and challenging student academic achievement standards' to carry out the state's plan under the Act. The obligations contained in the section referenced by the plaintiffs are placed on the state in regards to all students. It does not contain specific obligations to children with disabilities nor does it alter the Court's standard of review in regards to the IEP in question."

There are some indications that IDEA’s substantive education standard is changing. A Texas district court recognized that “[i]n early 2004 Congress reauthorized and renamed the Act as the Individuals with Disabilities Education Improvement Act of 2004 . . .

36 Id. (quoting Ridgewood Board of Education v. N.E., 172 F.3d 238, 248 (3d Cir.1999)).
which retains the major provisions of earlier version but aligns the IDEA more closely with the No Child Left Behind Act of 2001 . . . 37
The United States Office of Civil Rights also issued an opinion38 that responded to a report that some school districts “refused to permit qualified students with disabilities to participate in accelerated and gifted and talented academic programs or that schools conditioned participation in such programs on the abandonment of special education and related services.”39 The Office of Civil rights concluded that such practices violated:

i. Section 504 of the Rehabilitation Act of 1973;40
ii. Title II of the Americans with Disabilities Act;41
iii. and the Individuals with Disabilities Improvement Act.

Specifically with regard to FAPE, if participation in an accelerated class or program is part of the regular education referenced in Section 504 or the IDEA regulations, then a qualified student with disabilities is entitled to support while participating in the program and cannot be denied special education and related services as a result of the child’s advanced placement.42

OCR gave the following example: If a student's IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program, and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services such as extended time on tests or the use of a computer to take notes43

C. NCLB: Some researchers believe that the influence of NCLB on IDEA better serves students with special needs; the majority does not.

1. In favor

- Some commentators like it because it requires higher academic performance expectations for all students, including those with disabilities, and holds schools accountable for their students’ achievement.44

- NCLB encourages greater inclusion of disabled students in the general education classroom and promotes high academic expectations in core subject matter.45

---

41 42 U.S.C. § 12102 et. seq.
42 Daniel, 37 J.L. & Educ. at 364.
43 Id.
45 Id. at 14 (citations omitted).
2. Against

- NCLB is a threat to the child-specific rights provided to students under IDEA. An emphasis on state-wide standardized testing and achievement scores will corrode individual consideration.\(^{46}\)

- Too much emphasis on tests, so schools will teach narrowly to tests and not a broad range of knowledge and skills.\(^{47}\)

- Test Anxiety\(^ {48}\)

- Community Backlash:\(^ {49}\) One study shows that a significant number of schools in three states failed to meet their AYP requirements primarily because of students with disabilities.\(^ {50}\)

D. However: NCLB Issues to be Considered

1. IDEA, 34 C.F.R. § 300.102(a)(1)(iv) – “the term regular high school diploma does not include an alternative degree that is not fully aligned with the State’s academic standards, such as a certificate or a general educational development credential (GED).”

   Hence, the implication is that an otherwise eligible student with a disability who has acquired a GED, but not a regular high school diploma is not excluded from services under IDEA.

   **Barnett v. Memphis City Schs.,** 2004 WL 2452542 (6th Cir. 2004). Parents not provided with full record of assessments and student showed little achievement toward IEP goals; he, nevertheless received a GED degree. Ruling: 34 C.F.R. §102(a)(3)(i). High school graduation will only terminate a student’s eligibility under IDEA if a regular education diploma is received.


\(^{48}\) Id. at 1120.

\(^{49}\) Id. at 1119.

\(^{50}\) Suzanne E. Eckes & Julie Swando, *Special Education Subgroups Under NCLB: Issues to Consider*, 111 TEACHER'S COLLEGE RECORD 2479, 2490 (Nov. 2009).
2. Highly Qualified Teachers (HQT) – IDEA incorporates the NCLB provisions for all HQT’s. These include a bachelor’s degree, subject matter competence, full certification (including those through alternate routes) or the passage of a state licensing examination. The license cannot be waived on an emergency, temporary, or provisional basis.

Renee v. Duncan, 623 F.3d 787 (9th Cir. 2010) – students, parents, and community organizations brought an Administrative Procedure Act challenge against the U.S. Department of Education claiming that federal regulations permitting teachers in alternative route programs for certification, but not yet certified, could not be considered Highly Qualified Teachers as this was inconsistent with the wording of No Child Left Behind. The concern was that these interns who were progressing toward licensure would disproportionately populate the teacher ranks in minority and low-income schools. The court determined that the federal statute 34 C.F.R. § 200.56(a)(2)(ii) was invalid as the statute, 20 U.S.C. § 7801(23) requires the awarding of full certification, not, as evidenced in the regulations, “demonstrates satisfactory progress toward” certification. As a result of the decision the California HQT regulations that followed the federal statute were also declared invalid. Cal. Code Regs. tit. 5, 6101(2), 6110(2). The decision did not address the meaning of full state certification, preserving the authority of states to continue to set those standards.

3. Possible Indications that IDEA’s Substantive Standard of Education will Increase in the Future


While the primary funding for programs specifically focused on supporting students with disabilities is through the Individuals with Disabilities Education Act, our ESEA reauthorization proposal will increase support for the inclusion and improved outcomes of students with disabilities. Our proposal will help ensure that teachers and leaders are better prepared to meet the needs of diverse learners, that assessments more accurately and appropriately measure the performance of students with disabilities, and that more districts and schools implement high-quality, state- and locally-determined curricula and instructional supports that incorporate the principles of universal design for learning to meet all students’ needs.51

Schools, districts, and states must be held responsible for educating all students, including English Learners and students with disabilities, to high standards, but more work could be done to develop and scale up effective strategies for these students. Priority may be given to programs, projects, or strategies that are

---

51 Blueprint for Reform at 20.
designed to specifically improve the performance of English Learners or students with disabilities.\textsuperscript{52}

Throughout President Obama’s \textit{Blueprint} and following every point of reform he stresses that the reforms will extend to “all students, including English Learners and students with disabilities”\textsuperscript{53} or something to this effect.

This language however is not stronger than the language used to describe the 1997 amendments to the IDEA, nor does it explicitly change the substantive standard of education under the IDEA. Therefore, courts’ interpretation of FAPE will likely remain unaffected unless Congress expressly signals that FAPE has a heightened standard.

E. Americans with Disabilities Act Amendments Act of 2008

\textbullet{} The following summary was provided by the Equal Employment Opportunity Commission.\textsuperscript{54}

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments Act" or "Act"). The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.

The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

\begin{itemize}
  \item directs the EEOC to revise that portion of its regulations defining the term "substantially limits";
  \item expands the definition of "major life activities" by including two non-exhaustive lists:
\end{itemize}

\textsuperscript{52} Id. at 41.
\textsuperscript{53} Id. at 8. 3
o the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);

o the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");

• states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;

• clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;

• changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to admit or removal from a program) based on an impairment that is not transitory and minor;

• provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

F. Americans with Disabilities Act and Private Education

Private entities, including private schools, are “public accommodations” within the purpose of the ADA if they affect commerce. The Justice Department recently reached a settlement with Noble Learning Communities Inc. (Noble)—a for-profit entity that operates more than 180 preschools, elementary schools and postsecondary schools in fifteen states and the District of Columbia—to enforce the ADA. The Justice Department alleged that Noble violated Title III of the ADA by excluding disabled children from its programs. Assistant Attorney General Thomas E. Perez declared:

It is illegal under the ADA to discriminate against children with disabilities. Just like public schools, private schools must make reasonable modifications of policies to permit children with disabilities to participate fully in the programs they offer . . . This agreement ensures that children will not be denied quality preschool and other educational opportunities based upon their disabilities.

Key provisions of the Settlement Agreement include the following:

• Noble will adopt and implement policies that ensure it will operate in compliance with Title III of the ADA.

55 42 U.S.C. § 12181(7)(J) (educational institutions—public or private—are specifically mentioned).
57 Id.
• Noble will publicize its policy to its staff and make it available on its website and to any person upon request.

• Noble will pay $215,000 to the children referred to in the complaint.

• Consistent with the ADA, Noble will not make unnecessary inquiries into the existence of a disability or apply criteria that screen out students from its services.

• Noble will engage in processes to consider requests from students and parents for reasonable modifications that enable students with disabilities to enjoy Noble services unless Noble can show that the requested modifications fundamentally alter the nature of the services, goods, facilities, or accommodations at issue.

• Noble will designate a compliance officer to ensure Noble is following the ADA and to work with students with disabilities. Noble’s regional executives and principals will engage in training to understand their responsibilities under the ADA. Noble will report back to the Department of Justice at 12 and 18 months to communicate its progress under the Settlement Agreement.
Session 5

Lynwood (Lyn) E. Beekman
Chief Administrative Law Judge (former)
District of Columbia

Considerations for Better Management
of Your Hearings
CONSIDERATIONS FOR BETTER MANAGEMENT OF HEARINGS

Lyn Beekman  
Special Education Solutions  
5000 Chipping Camden Lane  
Okemos, MI 48864  
517-290-2555  
ses@spedsolutions.com

I. INTRODUCTION

From a review of some of your prior training materials, sample forms, and redacted case documents, as well as conversations with your Presiding Judge, it appears you manage your cases fairly well given your approach. But, there are a few areas where I believe improvements might be made. It is in those areas that I have some suggestions that I would like to propose and discuss with you during this session.

II. THE PREHEARING CONFERENCE (PHC)

A. The PHC is the key tool to managing the entire hearing process. When, and how, it is conducted will significantly impact, among other things, whether a case is settled (and when during the process), the length of the hearing and ultimately the quality of the decision.

B. To be blunt, the PHC is first thing that really forces parties/counsel to work on a case and generally they prefer to put work off as long as possible. They need to prepare for the PHC, and in doing so, must figure out exactly; 1) what they want you to decide; 2) grant as relief; and, 3) address as motions/requests either because of their implications on what issues will be heard or how the hearing will be conducted, appreciating that things for good reason may arise or change along the way. And, you can reasonably anticipate they will grumble a bit when forced to do so. But, to be fair to them you must first establish and advise them of your expectations for their participation in the PHC. See attached sample Notice of PHC and Subjects to be Considered.

In addition, you need to prepare for the PHC by carefully reviewing the DPC, response and pre-hearing statements. Tentatively identify questions to clarify issues/relief and roughly “outline” the issues, as well as the standards (and elements within each standard) to be applied in deciding each issue. You will then be able to generally identify the evidence you’ll need to decide each issue and
determine relief, if necessary. As the case proceeds through the PHC, hearing and briefing/closing argument stages you will no doubt need to adjust and fine tune your outline.

C. **The benefits of a properly conducted PHC** in managing the entire hearing process are significant. The PHC should:

1) **Clarify with precision the issues/relief** which often prompts settlement (and earlier in the process if the PHC is held earlier), focuses/lessens the preparation for all participants and shortens the hearing (e.g., If it’s an inappropriate evaluation, what aspect, why, discriminatory, only one source, improperly administered? If it’s an inappropriate IEP, what aspects (all of them) cause it to be inappropriate? If it’s an inappropriate program/service/accommodation, why and what do you contend is needed re: type, frequency and duration? If it’s an inappropriate goal, why, not measurable, not needed or needed but not even there? If it’s a failure to implement the IEP, what aspect, how and when? If it’s an inappropriate placement, why and what’s proposed? If it’s comp ed, what, how much, by whom, when to be delivered (noting the LEA had better be prepared to present a counter remedy if you should find a denial and relief is appropriate)? If it’s reimbursement, for what, who provided it, when, exactly how much is sought?). Sometimes a party may have a good reason for needing more time to respond to one of your questions. If so, set a reasonably short deadline for them to do so by getting back to you and the opposing party in writing.

Also, be sure to **simplify and organize the issues** (e.g., some counsel frame a LRE issue as five different issues. And, you can and should state them in your own words if necessary to make them clear and neutral, provided you eventually consider and address all the party’s arguments. See for example, J.W. v. Fresno Unified School District, 52 IDELR 194 (E.D. Cal 2009) and Ford et al v. Long Beach Unified School District et al, 37 IDELR 1 (9th Cir. 2002).

Sometimes the issue/relief discussion requires you to **get practical** given some issues need to addressed sequentially or cannot be addressed at all. For example, take a “shotgun” DPC regarding a non-IDEA student alleging a failure to identify, evaluate, develop an appropriate IEP and make an appropriate placement. And, it also seeks comp ed. Ask petitioner what do you really want me to decide at this hearing, eligibility? And, then are you planning to present evidence for me to develop an IEP, and then more evidence to determine a placement as well? Or, would it be more appropriate for me to determine eligibility, and if the student is found eligible, for the parties to return to an IEP team meeting?

This discussion will also provide the opportunity for you, if necessary, to let the parties know the evidence you think you might need/not need to decide an
issue/grant certain relief, and thereafter, the parties’ time to prepare/plan to present the evidence. Doing so will better insure you will get the evidence you need to decide the issues/grant the relief if necessary and may also shorten the hearing time.

Engaging counsel (or an unrepresented party) to discuss these matters will not be at all easy. But, it is a critically important part of your job if you are going to effectively manage the process. The PHO must carefully reflect the result of this discussion and allow for objections to it. See the sample PHO attached. In addition, one of the requisites for writing a good decision is to clearly define the issue at the PHC. The issues as stated in your PHO should usually be the same as stated in the issues section of your decision. This point will be discussed further below.

2) **Allow you to address in an orderly manner procedural issues early on** which might narrow issues/evidence, further lessening the parties prep time and possibly hearing time;

3) **Allow you to address in an orderly manner logistical matters** pertaining to the holding of the hearing (e.g., getting competent interpreters) possibly avoiding problems at the hearing.

In regard to interpreters, it is your responsibility to determine their competency. Cal. Admin. Code tit. 5, Sec. 3082(d). Obtaining the agreement of the parties on arrangements for the interpreter (who, their role, etc.) at the PHC is best, but such requires a PHC much earlier in the process. If a PHC is not held early on, then you should at least address the arrangements long before the hearing to hopefully avoid most problems e.g., translation allegedly is not correct, not understandable given a dialect or “low class”.

D. **Ideally, the earlier in the process the PHC is held, the better.** But, several factors need to be considered, weighed and then balanced including the ALJ’s time in possibly doing PHCs on cases that might have settled anyway more versus the time saved by those that the PHC prompted to settle or shortened hearing time on those that didn’t settle, the importance of obtaining one or more of the benefits of earlier PHCs noted above and possible systemic implications.

**If held before the resolution meeting** (RM) the PHC provides an opportunity for you to assist the parties in the logistics regarding the meeting e.g., when, who’ll be there and clarifying the issues/proposed resolutions enhances the chances for success at the RM.

Next best would be to **hold the PHC within a week of when the RM period ends**, typically 30 days after the due process complaint (DPC) was filed. This option still provides time to reap the many benefits of a PHC noted above. Or, a compromise as an alternative might be to hold a PHC at this point in time, but if
the parties still want to pursue settlement, limit it to just clarifying the issues/relief, set up a second PHC at which time the remainder of the PHC topics will be addressed if the matter has not been settled and hearing dates.

To be quite candid, holding the PHC approximately seven days prior to the hearing offers few, if any, management benefits. Doing so allows the parties/counsel to put off dealing with the case until practically the eve of hearing, and when they finally are forced to prepare and get into it, they want more time to prepare or pursue settlement, and not surprisingly, often seek continuances. This is a common, almost predictable phenomenon which I recently experienced first-hand in DC as an evaluator/technical assistance provider and then its Chief Hearing Officer. DC had about 3,000 DPCs a year and 20 HOs. As DC started to even hold PHCs (other than at the start of the hearing), and then hold them earlier in the process i.e., within a week of when the RM period ended, the kind of benefits noted above were obtained, e.g., more DPCs were clearer, requests for continuances dropped, the percentage of settlements improved and more cases settled earlier in the process, motions narrowing issues got decided before the parties got into prep, some logistical problems were avoided and some hearings were shortened. Some counsel grumbled at first. But, even they shortly experienced the benefits and it wasn’t long before practically all counsel lauded the new approach regarding PHCs.

III. MANAGING HEARING EVIDENCE

A. There are basically two ways to generally manage the evidence during a hearing:

1) “Micro managing” the evidence as it is introduced, the traditional approach; or,

2) Set a time in hours that each party has to present its case pursuant to Education Code 56505.1(h) and the factors noted there. (Times could also be set for the testimony of particular witnesses.) With this approach the party really decides what evidence is relevant and necessary to decide the issues/grant relief and, for the most part, assumes the risk of relevancy. This approach is not appropriate with an unrepresented party.

B. Assuming the traditional approach is being used, here are some common problems:

1) What has been referred to as a “log cabin” DPC (i.e., one which includes a tremendous amount of background information) leads to the petitioner seeking to introduce evidence “as background”.

2) The DPC alleges claims going back two years and the petitioner seeks to introduce evidence beyond the two year deadline “as background”.

© 2011, Special Education Solutions
3) Only the proposed IEP is in dispute but a party seeks to introduce a prior IEP(s) for “explanatory purposes.”

4) An exhibit/witness is not included in the 5 day disclosure but an alleged “good cause” reason for not doing so is asserted.

5) The “snapshot” rule, from *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999), is:

   “Actions of the school systems cannot…be judged exclusively in hindsight…[A]n individualized education program (“IEP”) is a snapshot, not a retrospective. In striving for “appropriateness,” an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted…[citing *Fuhrmann*]. Thus, we examine the adequacy of [the infant child’s] IFSPs at the time the plans were drafted.”

   In *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3rd Cir. 1993) the concurring opinion noted neither the statute nor reason countenance “Monday Morning Quarterbacking.” But, it went on to say “evidence of a student’s later educational progress may only be considered in determining whether the original IEP was reasonably calculated to afford educational benefit.”

   The Second circuit posited the possible distinction between “IDEA claims that dispute the validity of a proposed IEP, on the one hand, and suits that question whether an existing IEP should have been modified in light of changed circumstances, new information, or proof of failure.” *D.F. ex rel. N.F. v. Ramapo Cent. School District*, 430 F.3d 595, 599 n.3. (2nd Cir. 2005).

   A party seeks to introduce the student’s later progress or lack thereof.

6) A party repeatedly introduces evidence that appears to you not to be relevant but the opposing party does not object.

7) A party seeks to introduce research studies regarding the appropriateness of a methodology on students with needs allegedly similar to the student’s needs.

8) A party seeks to introduce voluminous exhibits without any explanation other than a general assertion of relevance.

9) A party seeks to call several witnesses to give further testimony on matters which already appear in the record.
10) A party in response to your questioning the relevancy of certain testimony asserts the right “to build a record.”

The standard for the admission of evidence is, in pertinent part, as follows:

“The hearings conducted pursuant to this section shall not be conducted according to the technical rules of evidence and those related to witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil cases....” Cal. Admin. Code tit. 5, Sec. 3082(b).

Bottom line, in deciding the admissibility of evidence, the relevance of which is tenuous, I suggest you **balance the probative value of the evidence in addressing the issues to be decided versus the “cost” to the process of doing so** i.e., the hearing time which will be utilized. (Refer to your outline of issues and standards/elements as a reminder to keep you and the evidence focused on what needs to be decided.) Under IDEA, the time spent in hearing, the cost of the hearing and delay are all valid factors to consider in managing the hearing process. See Letter to Anonymous, 23 IDELR 1073 (OSEP) regarding the factors a hearing officer should consider in whether to allow the use of telephone testimony. And, remember that for each minute of direct testimony you allow, you can reasonably anticipate almost an equal amount of cross examination, if not on occasion more, and then possibly some redirect.

In short, in each of the above situations I believe the hearing officer must stop and give very careful consideration to balancing the above factors for **once the initial decision on admissibility is made, as a matter of fairness, it is next to impossible to turn back.** And, in the above scenarios, often rejecting the initial temptation to allow some evidence is the tough but right decision in striking the noted balance.

**IV. MANAGING DECISION WRITING**

A. **One of the requisites for writing a good decision is to clearly define the issue(s).** This point (together with the second requisite i.e., deciding the facts) was discussed at some length in a presentation years ago to administrative law judges by the famous D.C. Judge Prettyman. A transcript of the presentation is attached.

In his remarks Judge Prettyman noted defining the issue(s) needs to be done at the PHC where the work on the writing of a decision begins. And, he acknowledges **it is very difficult job to make lawyers tell you what they want you to decide!** They come up with excuses he notes, or try to slant things one way or another, not wanting to come to the point. He stresses you have to be very tough at
this point because you need to know what the issue(s) is that you are ultimately going to have to decide. And, I would add, the more precisely the issue is stated, the more focused the entire process will be from the pre-hearing thru the hearing with the taking of evidence to the decision.

B. In the discussion on the prehearing above, I suggested you make a tentative outline of the issues and applicable standards, to be adjusted on an on-going basis throughout the process. If you do, when it comes time to write the decision you have your **statement of issues**. Plus, you have a rough outline of your **conclusions of law**. And, the standards/elements in your conclusions of law force you to identify the **facts you need to find to apply the standards/elements to the facts in the case before you**. Your order should then address in some way each issue. This approach helps you check across the sections of your decision to ensure they mesh organizationally, logically and legally.

C. With regard to briefs I would like to make two suggestions:

1) The fundamental purpose of a brief is to help you decide the issues. Don’t have counsel spend time on writing, and you reading, briefs on issues that you don’t need help in addressing. At the end of the hearing, or in an e-mail the next day which you have told counsel will be coming, **advise them** of issues/standards where you need no help and those where you do.

2) I notice you sometimes allow reply briefs. This takes more time. **Consider** as an alternative **scheduling a recorded telephone conference call** (which would be made a part of the record) a few days after the first briefs are filed. Counsel would each be given say 10 minutes to respond to the others brief. And, you would thereafter get to ask them questions regarding their briefs, responses or anything else you thought would be helpful in deciding the case.
NOTICE OF PREHEARING CONFERENCE

A prehearing conference by telephone has been scheduled for ___________.

Please be advised that the purpose of this Notice is two-fold. The first purpose of this notice is to advise you of the various matters that I will discuss with you during the prehearing conference. The second purpose is to provide you an opportunity to confer with your client prior to the prehearing conference and take such other steps as may be necessary in order to meaningfully address these matters and otherwise participate in the prehearing conference.

Note: The attorney for each party participating in any conference shall have the authority to enter into stipulations, make admissions of fact, identify claims and defenses that the party will not be contesting, and settle all or part of the claims in this case, or have reasonable access by telephone to the party or the party’s representative having such authority.

At the time of the prehearing conference, it is my expectation that the parties will be in a position to discuss and address all of the items on the enclosed Subjects To Be Considered.

Within three business days of the prehearing conference, I will issue a detailed prehearing order that includes all stipulations, admissions of fact, agreements reached, and rulings made during the prehearing conference. If either party believes that the prehearing order contains omissions or misstatements, the party must bring them to my attention within three business days of the date of this Order (with a copy to opposing counsel). I will address your concerns promptly.

Date: ______________________  Hearing Officer
Appendix A/Form 5 – Prehearing Conference – Subjects To Be Considered

**PREHEARING CONFERENCE – SUBJECTS TO BE CONSIDERED**

1. If a party is not represented by counsel, does the party plan to retain counsel before the due process hearing? If so, the party or new counsel must immediately advise the Hearing Officer and opposing counsel of the counsel’s appearance in the case.

   If not represented by counsel, did the parent receive notice of any free or low cost legal services that may be available?

2. When did the Resolution Meeting process conclude? What was the agreement reached by the parties, if any? If DCPS is the LEA, did it file the disposition form and was it signed by the parties? Are the parties willing to pursue/considering pursuing in good faith mediation or further settlement discussions? When does the 20/45-day deadline start running?

3. Please indicate whether the student’s name, date of birth, school of attendance, and student number are accurately reflected on the due process complaint notice.

4. What are the specific issues to be determined (e.g., what aspects of the IEP are alleged to be inappropriate?) and what is the specific proposed relief (e.g., what type/amount of comp ed is sought?) During the prehearing the Hearing Officer may require the parties to provide further clarification of their claims, defenses and relief requested.

5. Did the Respondent file a response? If not, how will the Hearing Officer address Respondent’s failure to file it?

6. Are there any admissions of fact or stipulations? Did the parties reach an agreement on any of the claims in the complaint? The Hearing Officer may ask counsel to certify in the 5 day disclosures or start of the due process hearing that they have attempted in good faith to stipulate to facts that are not in dispute.

7. If this is an expedited hearing in the context of discipline, are there other issues presented that require bifurcation (given the different timelines)?

8. What witnesses does each party plan to call at the due process hearing i.e., description of each witness and the subject matter of his/her testimony. How much time is needed to hear the case? What additional time, if any, should be scheduled to deal with unanticipated problems/delays?

9. When will the hearing be held (i.e., dates and times)?

10. Is any continuance of the 45-day timeline anticipated? If so, how might it be avoided?

11. What is the due date for the five-day disclosures of proposed exhibits, witness lists (including a name, role/position, address, phone number, and general thrust of the testimony), and evaluations/written recommendations that may be used at the due process hearing?

   **Note:** (1) The disclosure must separately identify those witnesses whom, and exhibits which, the party expects to present/offer and those whom/which the party may call/offer if the need arises; (2) the disclosure must designate witnesses expected to be presented by telephone if allowed in
the discretion of the Hearing Officer; (3) copies of all proposed exhibits shall be marked (Petitioner as P-1, Respondent as R-1 and Joint as J-1); (4) each party shall at the 5-day deadline send the Hearing Officer a copy of the disclosure with the exhibits divided by tabs, in such manner as the Hearing Officers directs; (5) in their five day disclosures, each party must provide a curriculum vitae for all proposed expert witnesses.

Hearing Officers may require counsel to provide written objections to the opposing party’s exhibits within two business days of their receipt of the five day disclosures. Hearing Officers may also encourage counsel to submit joint exhibits when possible.

12. Has either party had or anticipate having a problem accessing or obtaining witnesses or records (e.g., the need to compel witnesses or the production of documents)? The requesting party should be prepared to explain the relevance of the witness testimony or records requested.

If yes, the party that refuses to produce the witness or records should explain why they will not voluntarily ensure the appearance of the witness or production of the documents. Will the LEA make current employees voluntarily available at the due process hearing?

13. Does either party anticipate any witness scheduling or other logistical problems? How does the party propose to resolve them?

14. Have counsel provided the Hearing Officer all known (to both counsel and his/her firm/organization) pending due process complaints and all HODs rendered and settlement agreements reached in the last 18 months regarding the Student?

15. Do the parties anticipate any motions or other disputes that should be addressed during the prehearing conference? If so, how will they be addressed i.e., the dates on which motions must be filed and the timeline for decisions on the motions?

16. Should a date and time be set for a second prehearing conference, and if so, when?

17. Any other matters that the Hearing Officer deems appropriate.

NOTE: When the parties are represented by counsel, it will be presumed (and included in the Prehearing Order), unless counsel objects at the prehearing conference, that:

- There are no objections to the appointed Hearing Officer.
- The Parent opts for a hearing to be closed.
- The Parent will participate in the due process hearing.
- The Student will not be present at the due process hearing.
- Neither party requires interpreter services or other accommodations.
- The Petitioner shall proceed first at the hearing.
- The Petitioner shall carry the burden of proof.
- The parties shall be prepared to present oral closing argument
- The Parent elects to be provided a written decision.
- The parties consent to a copy of the decision being transmitted electronically or by facsimile.

DIRECTIVE: Counsel are directed that, between now and the time the HOD is issued, should any dispute arise, counsel must first confer with opposing counsel. In the unlikely event that counsel cannot resolve the dispute between themselves, counsel must immediately submit by e-mail any appropriate
written motion or documentation and arrange a status conference by telephone to present the matter to the Hearing Officer for decision after argument. If counsel are unable to resolve the dispute between themselves, they should be prepared to discuss at the telephone status conference whether the offending party should face adverse consequences.
PREHEARING ORDER

On ______________________, a prehearing conference was held in the above matter. Participating in the conference were: Petitioner’s counsel, _______; Respondent’s counsel, _______; and others, _______.

The following matters were addressed:

1. The parties concluded the Resolution Meeting process by [waiving the RM process, failing to reach an agreement, or agreeing to continue the RM process or pursue mediation]. Accordingly, the parties agreed that the 45-day timeline started to run on [month, day, year].

2. The issues raised by the Petitioner, including the relief requested, and the response of the Respondent, present the following issues, defenses and requested relief for determination by the Hearing Officer: [State: (A) If no response, or it was unresponsive, how you addressed it; (B) the issues and relief, specifically and fairly, including the position of the Respondent as to each; (C) the disposition of all other issues, defenses and relief raised in the complaint and response; (D) any further requested clarification of claims, defenses or relief requested (e.g., the ways the IEP is inappropriate or the details of the comp ed requested) and the timeline to do so; (E) any admissions, stipulations or resolution of claims.]

3. After discussing the time necessary to hear this matter, [and noting if it is an expedited hearing], counsel agreed that the due process hearing will be held from ___ to ____ p.m. on [month, day, year]. Counsel shall immediately advise the Hearing Officer if a party will request a continuance or plans to withdraw a complaint.

4. The deadline for the parties to exchange their five day disclosures, i.e., the lists of their potential witnesses, copies of potential exhibits, and copies of available evaluations and written
recommendations intended to be used, is [month, day, year]. Both counsel shall concurrently mail a copy of their five day disclosures to the Hearing Officer with exhibits divided by tabs, [or note the manner you direct]. [Counsel are directed to adhere to the specific requirements for disclosures as set forth in Practice 8-B-2 through 4 in the Uniform Standard Practices.]

5. [Here the Hearing Officer should record the result of the discussion regarding records and witnesses (e.g., the LEA will provide to counsel __________ records by __________, the LEA will make available __________ at the time of hearing, or the Petitioner/Respondent will file a request for a Notice to Appear with the Hearing Officer by __________]  

6. Counsel advised that they are aware of the following pending due process complaints, HODs, and settlement agreements regarding the Student within the last 18 months: _____________.
[Counsel are directed to provide a copy of __________ in their disclosure.]  

7. Counsel were asked if they had any objections to the presumptions regarding the various procedural items set forth in the “Note” near the close of the “Prehearing Conference—Subjects To Be Considered” form, which was enclosed in the Prehearing Notice. Counsel agreed:

- There are no objections to the appointed Hearing Officer.
- The Parent opts for a hearing to be closed.
- The Parent will participate in the due process hearing.
- The Student will not be present at the due process hearing.
- Neither party requires interpreter services or other accommodations.
- The Petitioner shall proceed first at the hearing.
- The Petitioner shall carry the burden of proof.
- The parties shall be prepared to present oral closing argument
- The Parent elects to be provided a written decision.
- The parties consent to a copy of the decision being transmitted electronically or by facsimile.

[If counsel made an objection to any item, record the objection and how the objection was addressed.]  

8. With regard to any motions or other problems to be addressed or anticipated, counsel advised: [record the results of the discussion, including dates for any motions to be filed and when they will be ruled upon].

9. Counsel are directed that, between now and the time the HOD is issued, should any dispute arise, counsel must first confer with opposing counsel. In the unlikely event that counsel cannot resolve the dispute between themselves, counsel must immediately submit by e-mail any appropriate written motion or documentation and arrange a status conference by telephone to present the matter to the Hearing Officer for decision after argument. If counsel are unable to resolve the dispute between themselves, they should be prepared to discuss at the telephone status conference whether the offending party should face adverse consequences.

[A second prehearing conference is set for __________, at ____. The Hearing Officer may cancel the second prehearing conference if it is no longer needed.]  

10. [The Hearing Officer should record any other matters discussed, agreed upon or ruled on which should be placed on the record.]
11. The parties and their counsel will be held to the matters agreed upon, ordered, or otherwise set forth in this Order. If either party believes this Hearing Officer has overlooked or misstated any item, the party is directed to advise this Hearing Officer of the omission or misstatement within three (3) business days of the date of this Order (and provide a copy to opposing counsel). The Hearing Officer will address the party’s concern promptly.

IT IS SO ORDERED.

Date: _____________________  __________________________________________

Hearing Officer

Copies to: All Counsel
ARTICLE: ADMINISTRATIVE HEARING OPINION WRITING

by E. Barrett Prettyman *

BIO:

* The U.S. Courthouse where the District of Columbia Court of Appeals sits in Washington, D.C. is named the "E. Barrett Prettyman Courthouse." Appointed to the Court by President Harry S. Truman in 1945, Chief Judge E. Barrett Prettyman served on the court until his death in 1971 (the last several years in a senior judge status). Among his other accomplishments, Chief Judge Prettyman was influential in the development of administrative law. In 1953, President Dwight D. Eisenhower appointed him as chairperson of the President's Conference on Administrative Procedure. In 1961, President John F. Kennedy appointed him as the first chairperson of the Administrative Conference of the United States (ACUS). In 1963, Chief Judge Prettyman gave this speech on opinion writing to a group of federal administrative law adjudicators (or "hearing examiners" as they were then called). Following the speech, he took part in a panel discussion on opinion writing. Ward & Paul, Inc., court reporters, transcribed the speech and panel discussion but the transcript has not been widely distributed. It was found in the stacks of the Tarlton Law Library, University of Texas School of Law, Austin, Texas, and rescued from obscurity. Aside from whatever historical significance these materials may have, they contain a comprehensive discussion of opinion writing in an administrative adjudication.

TEXT:

JUDGE PRETTYMAN: I thank you very much, Dean Kramer.¹

First off, I would like to say this is going to be totally informal. I do not have a prepared text or manuscript before me. I have notes, and I am just going to talk. It will be informal, totally informal.

In the next place, I would like to say that, really, I ought not to be here. I, as you know, am retired and kind of last year's business.

I really do not have any business intruding myself in the live, going organizations or ventures, but I could not resist, really, for two reasons:

In the first place, because this is one of my favorite audiences. I do not know all of you personally, but I sort of feel like I am among old-time friends here. We are fellow fighters in this area, and I could not very well resist the temptation to come down and be with you.

And the next thing is that I am utterly in favor of this program.² I think it absolutely magnificent. I think it is bound to increase and go on, and, as it does, I am absolutely certain it is going to be a major factor in the improvement of government.

¹ Robert Kramer, then Dean of the George Washington University Law School, introduced Judge Prettyman.
² Judge Prettyman spoke to a program billed as the "Federal Hearing Examiners' First Annual Seminar," held in Washington, D.C., September 23-25, 1963.
As you know, my own view is that the best hope of achieving practical results in improving the operations of the government in these complicated days is in the increased status of the Hearing Examiners in the regulatory processes.

Regulatory processes, of course, cut every phase of our life. You are the people that make the basic decisions on contested points, contested matters, rule-making, adjudications. If we are going to improve the processes of government in a major way, our best hope lies in improving the stature of the Hearing Examiner.

Now, while I hold that view, I am absolutely convinced, as I suggested to you a couple of years ago, that the Hearing Examiners, themselves, must hammer out the higher status. No use going around asking people to raise your status. That will not get you anywhere.

The way your status is going to be raised is the same way the status of other parts of government have been raised and reached high levels. It is that the people involved, themselves -- in this case, the Hearing Examiners -- create such a situation, that the people -- and that includes government and outside people as well -- come to have such a high regard for the work of the Trial Examiners that the status just rises.

There is no way to keep it down once you create that situation. Your status will go higher when your work goes higher in the esteem of the people and the bar and everybody else.

Now, let me say this before I launch into what I really have to say. The views that I am going to express to you and the notions that I am going to present are my own. This is no review of somebody's study of the subject. I am not going to cite what somebody else thinks about it or what somebody said about it or something like that. You can read all that yourself. What I am going to talk about is based on my own experience, experience in trial and administrative law.

Therefore, you might expect that my personal eccentricities, of which there are many, will loom large in the course of what I have to say.

I mention that so you can discount from the start.

This fact is made plenty apparent by the pitiful little bibliography that is attached to my remarks. There was not anybody for me to cite but myself.

In the next place, and the last in the way of preliminary remarks, I guess what I have to say is 85 percent idealistic. It is the way I think it ought to be done, and not the way that I say it is done; not even the way I say I do it; but this represents the way I think it ought to be done.

The subject, as your program indicates, is opinion writing. Now, we are talking about opinions, at the trial level, opinions written by the Trial Officer, similar to the opinions written by a trial judge in a non-jury case in a District Court.
An opinion at this level has preliminary requisites, that is, preliminary essentials. An opinion is not just a vague scratching in a vacuum. It is not just taking up a pencil and a piece of paper and writing a lot of things. Opinion writing at the trial level is not just writing. It is hard work, and you just have to get that in your head.

I repeat, if you are going to write good opinions, if you are going to amount to anything as a Trial Examiner, it takes hard work. But if you work hard, you can do it.

There are effective practices. Just as there are effective practices in laying brick to build a brick wall, there is an effective way to do it. If you do it the effective way, it takes a lot of time and a lot of trouble; but if you do it that way, you will build a good wall; and it is so about writing a opinion.

Now, the two requisites:

The first requisite is that there be issues and that you know what the issues are. In an adjudicatory proceeding there are issues.

I think that you cannot try a case unless you have issues. It sounds like a silly thing to say, but there are some people -- really, there are some people who think you try cases with no issues. You just go in and everybody puts in whatever they want and they talk about whatever they want to talk about and you go along, and after a while, when you get tired, you call it off, and that is it.

That is not an adjudicatory process. You are supposed to try an issue. What is an issue?

Now, this is the first requisite. You are not going to write an opinion -- you know, when you start, the opinion is going to be no good -- unless you know what the issues are.

Now, a funny thing about that situation is, it is a very -- of course, you fellows know better than I do -- it is a very difficult job to make lawyers state what the issues are.

That always strikes me as being a very, very peculiar thing. Of course, it is terribly difficult to do at the trial level when you start out: "Well, what are we here to decide? What are you going to present to me for me to decide?"

It is awfully hard to make a lawyer do this. Strange as it is, it is hard to make him do it at the appellate level. I often say it is almost as hard for an appellate court to find out what the question is in the case as it is to decide it after you know what the question is.

Lawyers have excuses always and kind of slant it one way or the other and do not come to the point of the thing.

But the first requisite for writing a good opinion is to have the issues defined in the first place -- what the questions are. And the place where you do this nowadays is in the pre-hearing conference.
Now, I think you have had some discussion of pre-hearing conferences, and you know all about that. But, at any rate, in the pre-hearing conference is where you begin to work on the ultimate writing of the opinion. That is the place where you define issues.

And if you are going to be any good as a Trial Examiner, you have got to be very tough at that point. You have got to make the lawyers define what the issues are so that you know what the question is that you are ultimately going to have to decide. To know that in the beginning is one of the requisites of a good opinion.

Now, the second requisite for a good opinion is the facts. The second requisite is the facts.

I am pretty much a nut on this subject. The facts of the lawsuit that is what the lawsuit is. Once we get the facts established, why, then, generally speaking, the rest of it is a breeze. It is the facts that are the requisite to a good opinion. A good opinion in a lawsuit, in an adjudicative proceeding, is not a law review article on some general subject of the law. It is an opinion on this controversy, this controversy between A and B, between the government and Joe Doaks, and the opinion is directed to that controversy, and that controversy consists of facts. It is premised upon facts.

An absolute essential, an absolute, indispensable essential to a good trial opinion is a good set of findings of fact.

Now, making a good set of findings of fact is a lot of work. Here, again, we stumble into this matter of work; it is a lot of work.

There are certain essentials to a good set of findings of fact, I list three:

One is impartiality; one is completeness; and the other is accuracy.

But the most important of these three essentials is accuracy. That is the absolute, indispensable essential of good findings of fact -- accuracy. You will never come into high regard of anybody unless your findings are accurate. You will never contribute to the administration of justice to any measurable extent unless your findings of fact are accurate.

Now, if you have a short case, a case that only takes a day or two, or something like that, it is not too complicated a matter to make up your own mind as to what the facts are pretty much out of your memory and your odd notes.

You have got a right, of course, to reject anything you do not believe. Any evidence you do not believe, you have to reject it. But your findings ought to be premised on all the credible evidence in the record.

Of course, the rule is that your findings cannot be disturbed if they are supported by substantial evidence on the record as a whole, or in some cases, by the preponderance of the
evidence, as by the civil rules, unless they are clearly erroneous. But those are minimum
requirements. They are not the measurement of good findings of fact. The measurement of good
findings of fact is that they are accurate.

Now, as I say, in a short case, you listen to some witnesses for, say, a couple of days, and
you know pretty well what you believe, and you write your findings without too much difficulty
and it will be accurate.

But in a long case, writing the findings is quite a chore.

I had some experience while I was practicing law, trying my own cases, and I had a
method that I followed for preparing proposed findings, and when I went over on the Third
Circuit to take evidence with Judge Soper and Judge Mahoney in the Universal Oil case,3 I got
them to let me use that system over there. Then I wrote the initial draft on "the facts of the case,"
which is now in the handbook on protracted cases.4 I am going to take the time to describe that
system for you. As a matter of fact, I have been wanting a chance to describe this for a long
time.

When we went over to try the Universal Oil case, we took testimony for 10 days. I do
not know how many witnesses there were, but there were over 300 exhibits, I think, and at the
end of 10 days (the hearing started on May 10, the end of 10 days was May 20), we said
"Gentlemen, we would like you to argue the facts in this case. We will give you a little time.
Come back in 10 days."

So they came back after the May 30 holidays, and argued the case, argued the facts, for
three days. Every lawyer in the case -- and there were five different groups of lawyers involved -
- everybody in the courtroom had exactly the same record references before him. The case came
to us on about the 3rd of June. On the 6th of July, Judge Soper filed the findings of fact and an
opinion which took up 25 pages of F2d, complete on July 6, which is less than 30 days after we
got the case. In the original filed copy of the findings, every finding was keyed to every place
where the subject had been mentioned in the record.

It is not an earth shaking idea or anything like that, but here is the way we do it. Maybe
some of you have heard me explain this before.

Let us assume in this case that we got daily copy. If you do not get daily copy, you
follow the same system except that you must wait until you get the transcript. But let us assume
we have daily copy.

You have an indexer, who is a young law clerk or a deputy clerk or a law student, but
somebody has got to pay attention and has to do this job. His first duty is to be in on some of the
preliminary stuff, particularly at the pre-hearing conference, so that he knows what the questions
of fact are going to be in the lawsuit.

4 HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, Judicial
When he gets the daily copy the first day, he sits down and takes a big-card and a pen, and he opens it to where the first witness goes on, and at the top of this card he writes the name of that witness.

Let us say that this fellow happens to be -- his name happens to be Morris. So he writes "Morris" at the top of this card. Then he starts reading Mr. Morris's testimony, and as he reads along, he finds Mr. Morris begins to discuss "the Universal Oil patent litigation" - page 26.

Then he reads along, and he finds that the next thing Mr. Morris talks about is the Crew-Levick case. So he writes that down, Crew-Levick, and the page. He reads through Mr. Morris's testimony, and he writes down on the card every topic that Mr. Morris talks about.

Now when he gets through that first day's work or at some point along, he takes another card. If he has an assistant so much the better.

He picks up the Morris card, and the first topic that Morris talked about is Universal Oil patent litigation. So he entitles the first card "Universal Oil patent litigation." So he entitles this fresh card "Universal Oil patent litigation." Then he writes on this card, "Morris -- that is the witness's name -- page 26," and puts that in his intended file box.

Then he gets another card, and the next topic Mr. Morris talks about is the Crew-Levick case. So he puts the title on the new card, "Crew-Levick," and he puts "Morris," the witness's name and then he puts page 26." He puts that card in the box.

Now, he goes along down, and he comes to another witness. We will say that witness's name is Hall. Our indexer opens another witness card for Hall, and he writes on it every topic discussed by Hall. He finds that Mr. Hall finally gets around to talking about the Crew-Levick case. As soon as he sees that, he pulls the card headed about "Crew-Levick" out of the file box, and he puts on it "Hall, page 150." And then he puts it back in the box. He goes on with Mr. Hall's testimony.

Then, let us say the next witness is Mr. Height. He entitles a card for Mr. Height. He puts down the topics that Mr. Height discusses, and lo and behold, Mr. Height gets to talking about the Crew-Levick case. As soon as he sees that, he pulls the card headed about "Crew-Levick" out of the file box, and he puts on it "Height, page 340." He reads carefully along through the transcript and puts on one set of cards under the witness's names every topic discussed by each witness. On the other set of cards with topic headings, he puts the name of each witness who discussed that topic, with the page number.

Now, the result of that is that at any minute in the hearing, if the hearing lasts two weeks or two months or six months, you know by an instant reference every page in the record where the Crew-Levick case has been mentioned and the names of all the witnesses that mentioned it.
and the page numbers on which they mentioned it. And also you know in the other set of cards
every topic that every witness discussed and the pages at which he discussed it.

The witness set becomes of less importance as the case goes on. The topical set becomes
of importance, because, as all of you know, in all of these big cases, along about the second or
third week somebody says "Why, Mr. Height said that about the Crew-Levick case and so on and
so on." And some other lawyer will say "Why, he did not say that at all."

Then the other says, "He did. He was on the stand last Wednesday a week ago, and that
is what he said."

And the other fellow comes back with, "He said no such thing at all."

Then everybody scrambles in all those little blue books they all have. With this index I
have described, in front of them, no such question as that arises. Everybody in the courtroom
can turn instantly to exactly what Mr. Height said about the Crew-Levick case.

Now the case comes to an end. Let us look at the second index I brought along. Since
we were talking about the Crew-Levick case, let us see if I can find it here. There it is, "Crew-
Levick case." Everything that was said during that whole hearing on the subject of the Crew-
Levick case is indicated on these cards with that heading. The witness that talked about it and the
page at which the witness talked about it is right there.

Now, if you are going to write the findings of fact about what the evidence shows
concerning the Crew-Levick case, you just run through the record and put in a marker at each one
of these page numbers shown on the topic card, and when you read that evidence, you will have
read everything that was said in the record about the Crew-Levick case. And you base your
findings on all of the evidence in the record.

And when you make such a finding, you cite, not necessarily every one of the pages, but
every important place, every important page, in the whole record where that subject is
mentioned. Then you have an iron-bound, copper-riveted set of findings.

I advise strongly against digests. I think trying to keep a current digest of the record is a
vast mistake, because you characterize the evidence at that point. You ought not do that. You
ought not to characterize the evidence or draw inferences until all the evidence is before you.

This index only shows the places in the record where the topic is mentioned and you
draw your inferences by looking at all the evidence in the record.

Now, that method is recommended to the judiciary in the HANDBOOK OF
RECOMMENDED PROCEDURES FOR PROTRACTED CASES. Professor A.J. Priest, a
professor down at Virginia, is writing a handbook of recommended procedures for protracted
administrative agency cases as you know. He is writing that for the Administrative Conference.

5 Id.
I see that he is on the program tomorrow, and he is going to talk about that handbook that he is writing, and he has a description of that index in his recommended procedures.6

Now, there is a lot of work involved in that, but a big case involves a lot of work. If it is not a case where you get -- if it is not big enough to get daily copy, if you are well advised, when you get your record before you, don't try to just make up your mind about things. If you will sit down, take a couple of days and do exactly what I have described to you, taking that record and doing that; if you make cards by witnesses and, from them, index cards by topics; then you start to do your concluding. In this way you start making the findings based on all the evidence just as it is in the record.

Now, that is a mechanical method to achieve accuracy; and accuracy is the object.

Now, let me stop a moment and just remind you that you should keep in mind there are two different kinds of findings of fact, and the way people mix them up is something terrible. You find the basic facts and you find the ultimate facts and they are different.

The basic facts are facts that you find in the evidence. The evidence is so and so, so and so, and I make a finding based precisely on the evidence -- that is a basic fact.

Now, with the basic facts before you, you can then draw some inferences from the basic facts, and they are the ultimate facts. Ultimate facts are inferences from the basic facts. Basic facts are directly drawn from the evidence.

The rule as to basic facts is that they must be supported by substantial evidence in the record.

The rule as to ultimate facts is that they must be a rational deduction or a reasonable deduction from basic facts.

You should always have in mind what it is you are doing. If you are making basic findings at the moment, have in mind what it is you are doing and base them straight on the evidence.

And there has to be substantial evidence to support them.

If what you are doing is making an ultimate finding, you are inferring something from basic facts. All I say to you is: Have in mind just what it is you are doing. Do not just infer some, draw some; you will get all mixed up. Know what it is you are doing.

6 Apparently never published. The University of Virginia Law Library website shows that A.J. Priest left his papers to the library. Among them are materials labeled, 1962-1964 HANDBOOK COMMITTEE - RECOMMENDED PROCEDURES FOR PROTRACTED HEARING BEFORE ADMINISTRATIVE AGENCIES. See http://www.law.virginia.edu/lawweb/lawweb2.nsf/4a87ff3bf2e03cc38525646f0072ffa9/60f31ec552d08a408a40852573160058e9ad?OpenDocument
Now, one word about proposals. I very, very strongly advise against having lawyers, especially winning lawyers, prepare findings for you to sign. I am absolutely and totally opposed to that.

I am in favor of having lawyers submit to you proposed findings just for your assistance, if you require in those proposed findings record references that tell you the place in the record where the facts are stated. That can be of some assistance.

This book I now show you came to my desk today. It is the record of a seminar for newly-appointed United States District Judges, just exactly the same thing as you are doing now. It was just held. These seminars began approximately three years ago. This last one was held -- I do not know which one this was. They held one this year in Monterey, California, and one in Norfolk, Virginia, and one in Dearborn, Michigan. I do not know exactly which one this particular one is, but the subject matter discussed in the seminar of United States District Judges is very, very similar to the subject matter that you are talking about. And my successor on the bench, who talked to you this morning, Judge Skelly Wright, made a speech on findings of fact, conclusions of law, and opinions. He made the talk to the District Judges exactly along the same subject that I am talking about to you at this time. I suggest that if you are interested in the subject, you read Skelly Wright's talk to the new District Judges about how to make findings and how to prepare opinions.7

He gives the objects, and I was fascinated by how he told them to make findings and how he told them to make accurate findings.

One suggestion that he made here -- this is a long story to call your attention to this -- one suggestion that Judge Wright made to the United States District Judges, in non-jury trials, which is just what you are handling, is that the judge require the lawyers to submit proposed findings of fact before the trial begins and even before the pre-hearing conference.

Now, I must admit this was a bit of a radical idea to me, but Judge Wright says that he has used it -- of course, he was on the District Court bench for 15 years -- and used it very effectively. It certainly is a very effective procedure for making the lawyers find out what the lawsuit is about, so that when they go in to actually try the lawsuit, they do not go all over the landscape.

Whether you require them before the trial begins or whether you require them after the trial has ended, the proposed findings by both sides with record references is very helpful.

If the lawyers would try facts, if lawyers knew how to try facts more than they do and if you Hearing Examiners made the lawyers try facts more than you do, lots and lots of problems would be simplified.

7 See, Honorable J. Skelly Wright, The Nonjury Trial-Findings of Fact, Conclusions of Law and Opinions, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES at p. 159 (Committee on Pretrial Procedure, Judicial Conference of the United States 1963).
It is when you get way off on Cloud 15, arguing about some theoretical problems of law which have no relation to any facts whatsoever, that is when you really get in trouble.

I will tell you a personal story. When I was practicing law, the war came on, and I had a client who made cough drops, and he wanted to get some sugar. The Office of Price Administration changed its mind two or three times about whether cough drops were candy or not. If it were candy, you could not get sugar. If it were medicine, you could get sugar. They wrote a rule saying some cough drops were not candy, and then they changed their minds and wrote a rule saying some cough drops were candy.

At this point this company came in to see me, and I said to them, "Get a couple of your boys and send them all over town and buy me a package of every cough drop on the market. Every kind of cough drop on the market, I want a package of them."

So they assembled them all, and I had quite a sack full of them. I went down to the hearing, it was a conference, and I went into the conference room, and I just took the sack and dumped it on the table.

I said, "Now, here is a package of every cough drop on the market. If you will take a look at them, you will see that some of them are candy, and that some of them are medicine."

So the conferee took and looked at them and some of them were just candy. They had some sugar and a little bit of seasoning. Some of the others were real, sure enough doses, prescription doses, of antiseptics, or an anesthetic.

I said, "That is all my case. That is it. Some of them are candy, and some of them are not candy."

Well, he thought that over a bit. He said, "Mr. Prettyman, I have been here two years sitting at this conference table, and you are the first lawyer that has been in here that has presented the case on the facts."

All right, now we come to some more on the opinion. The preparation of the opinion -- this is the opinion part now, apart from the facts. We will talk about that.

Legal reasoning generally is one or the other of two sorts.

You either reason from authority or you just reason by a process of reasoning.

The important thing for the Examiner in that respect is that he should know what it is he is doing. If he is deciding his case on the basis of authority, he ought to have that in mind and write an opinion accordingly.

If you are not deciding the case on the basis of authority, if there is no applicable authority or for some other reason and if you are reasoning out your conclusion, you ought to know that you are reasoning out your conclusion and proceed accordingly.
That is the important part; that is, in the preparation of the opinion, know and be totally conscious, as you think the opinion out, as you work through to your answer, what it is you are doing, whether you are relying on authorities, whether you are relying on reasoning.

If you get the two all mixed up, you are going to be all mixed up and the opinion is going to be all mixed up. Keep clearly in mind what it is you are doing and do just exactly that.

Now when you come to an authority, all authorities -- that is, case authorities -- have four parts: the facts, the question, the decision, and the reasoning.

The case is authority for the decision of the question upon the facts involved. It is persuasive, helpfully persuasive, for the reasoning by which that authority got from the facts to the decision on the question involved.

Now, those are two totally different things.

This thing of just taking a case and quoting a sentence out of it and saying in such and such a case, the court said so and so is absolutely nothing. We all do it; I do it; everybody does it; but we ought not to do it, unless you just want a phrase or something.

We decide too much litigation by slogans -- "clear and present danger," some slogan and just slap in. We don't take time to look and see what the facts are or what the question is, or anything of that sort. That is not the way to do it, that is not the way to decide lawsuits. You should not do it. And if you are basing an opinion on authority, on an authority, look at that authority and say to yourself, "Now, there are the facts. On those facts, this is the question: the court or the commission, or whatever, reached this decision, and the way it reached that decision was by this process of reasoning.

Now, if you have got similar facts and the same question that will be an authority for you. If you have got somewhat different facts but the reasoning is persuasive, it is persuasive in your case, but the decision, itself, is not authority.

Now, the important thing to the Hearing Examiner writing an opinion, again, is the same thing: He ought to know what it is he is doing. When he uses an authority, he ought to be conscious of what it is in the authority he is using and how he is using it.

Just as those are the four elements of an authority, those ought to be the four elements of your opinion, when you are through with it.

When you get your opinion written, you should have the facts, you should have the question, you should have your decision on that question on those facts, and it should recite the reasoning by which you got that decision from those facts. That is what your opinion ought to be.
Now, the composition, the composition of your opinion. The outstanding requisite for writing the opinion -- this is just the writing part, now -- is clarity. There is no other requisite comparable to clarity. Clarity is the thing.

In a sort of second place is simplicity.

But the outstanding virtue of an opinion, of a good opinion, is clarity. How are you going to be clear?

Well the way you will be clear on paper when you write it is to be clear in your own head before you write it. That is what you have to do.

The first thing you ought to do, you ought not to sit down to write an opinion with a pad of paper and a pencil. You ought to sit down at some point, preferably after you have made your findings and your findings are all accurate and down, and you have examined your authority, and then you sit back and say to yourself, "Now, what am I going to say? What am I going to say?"

Think. Make up your mind what you are going to say before you touch that pencil to the paper.

Say, "Well, what I am going to say is this," and then write it down, just exactly what you want to say.

Now, that is not the way you do it. That is not the way I do it either. Well, what I do, what I find out that I do, is that I start writing, I write and write and write, and then, eventually, the last thing I finally come to is what it is I want to say.

Then, I just take that whole business and tear it up in little pieces and throw it in the wastebasket. It is awfully tough to do, and you may have to go off and take a little leave from the office or the desk, get your mind off it, and come back, but by that time you know what it is you want to say, you know exactly what it is you want to say.

Then you write down on the piece of paper what it is you want to say, and you do not say anything else. Now, you have got a good opinion. That is the way you get a good opinion.

You think it through first, and then, when you think it through, you pick up a pencil and write it down.

I know that is the way to do it. I say I do not do it, but I learned early in the game that that is the right way to do it.

I have a secretary who has been with me for 25 years. She came in one day and said, "Judge, I do not understand this paragraph," in an opinion she was typing. "What does that mean? I do not understand it."

I said, "Well, that is perfectly simple. It means so and so and so and so and so."
She said, "Well, is that what that means?"

I said, "Yes."

She said, "Then, why don't you say it?"

You ought to say what you mean exactly, and the only way to do so is if you think it out first and know yourself what you mean. You cannot be clear on paper if you are not clear in your own mind.

You write and you rewrite it and you rewrite it and you rewrite it. You do not do that just for literary style either. You do that for clarity. You look at it. That is not clear. That sentence is not clear. Throw it in the wastebasket and write it again.

I do not hesitate about rewriting, rewriting, and rewriting.

We have had drafts as many as 10 or 12 in the same opinion.

Do not ever try to be cute in writing an opinion. Do not try to be smart. Try to be clear about what you are saying.

And another thing is: Do not ever, in writing an opinion try to please everybody. If you are going to be a good Trial Examiner, you have got to have a tough skin.

And, you know, the funny part about that is if you do not try to please anybody, if all you try to be is cold-bloodedly accurate in your findings of fact and clear in your opinions, that is all you tried to do, you will please everybody.

That is the way the bar and the public, the people, come to have a high regard for the people that are charged with the terrific responsibility of making decisions in disputed controversies.

Dean Kramer, I am through. I thank you all very much.

(Judge Prettyman received a standing ovation.)

DEAN KRAMER: Thank you very much, Judge. We are most grateful to you, and at this point I think it would be anticlimactic to start anything else, so I suggest that we take an adjournment for a coffee break.

We will take a 15-minute adjournment.

(Whereupon, a short recess was taken.)

PANEL DISCUSSION
DEAN KRAMER: Ladies and gentlemen, I suggest we come to order because we have all too little time left.

Quite a few people have indicated to me that what they would really like to do would be to fire questions at the people up here on the stage.

For that reason, I am going to depart from the formal program.

We have three handsome young men there with writing paper, and they are going to pass this paper to you, and, if you will write your questions out, they will pick them up and bring them up here and we will shoot the questions, as long as time permits, at these gentlemen over here to my right.

If you will just write your questions out, we will proceed in that manner.

While that is happening, I will just say a word about the panel. The chairman of the panel is well known to you. He is the Honorable Frank McCullough from the National Labor Relations Board.\(^8\) Then we have Mr. Bertram Stillwell from the Interstate Commerce Commission.\(^9\) We were to have Mr. Ganson Purcell, but, unfortunately, Mr. Purcell has been unexpectedly called out of town by a death in the family. Judge Prettyman has very kindly consented, not to be a substitute, shall I say, but to be an addition to our panel.

So we have three experienced men up here, and between them I think they can field almost any question you can throw at them.

Let us have your questions and we will proceed on that basis.

MR. McCULLOCH: Dean Kramer, if I can just take advantage of the pause while you are getting the questions, I should perhaps say that I suspect that, as on the platform of any temperance lecture, you usually have a man with a red nose who is being a kind of bad example of whatever happens if you do not follow the advice of the man who is giving the lecture. Perhaps this is why I am here on the platform this afternoon.

I am only glad we are talking about your opinion writing and not mine. This is by way of saying that I hope that can field the questions for the most part by sending them in other directions.

It had been my expectation that I would be primarily a semaphore signal here this afternoon, and that the experts, one of whom you have just heard and the other two who were to be your panelists, would be the main ones to share with you their knowledge.

I can only say that I believe I feel the same thing that you feel about the man who has addressed us. I am sure we all wish we could be as fresh as the man who misdescribed himself

\(^8\) Chairman of the National Labor Relations Board during the Kennedy and Johnson Administrations.

\(^9\) High ranking staff member, Interstate Commerce Commission.
as "last year's business." And I also think that probably all of us wish that we could, in the same degree that he can, lean over upon our intellectual pasts without falling over.

These are merely by way of introduction in my hope that he and Mr. Stillwell will largely field the questions that you may present to us.

DEAN KRAMER: We have enough to get started. I will read the question and then I will see if anyone on the panel volunteers. If not, I will put the heat or the finger, the moving finger, on one of these gentlemen.

QUESTION: Is it more important to write clear opinions which require much time and care or to write quickly and not so clearly in order to reduce backlogs?

ANSWER: In the first place, you do not have to write a very long opinion on a simple question. On a simple question at the trial level you do not need a long opinion. All you need is a simple, short opinion, clearly stated, and that is it.

Now, then, if it is a question that requires an opinion, you do not reduce any backlog by writing a quick, lousy opinion, because the probability is all you do is to cause the given case to have a flock of kittens, and you have more cases on your hands than you had in the first place.

ANSWER (from another member of the panel): There is not any doubt in my mind that the correct thing to do is to write a good opinion. A good opinion from the Hearing Examiner opens the way for prompt disposition of the case by the agency. Where the opinion is no good, then the trouble starts. The agency has a lot of difficulty of disposing of the case promptly and effectively.

ANSWER (from another member of the panel): One of our Trial Examiners answered a question not unlike this by saying that it should be like a Siamese gown, long enough to cover the salient points but short enough to be interesting.

QUESTION: When one lifts bodily from the brief of counsel a pithy epigram, should he credit it to counsel or may he use it as his own?

ANSWER: That should be addressed to the clergy and not to us.

QUESTION: A speaker at the Trial Examiners' Conference, a former Trial Examiner, said, depreciating long opinions, "One should not discuss issues of law. Instead, let him simply cite a case."

Would any of you care to comment on the suggested technique?

ANSWER: I think he is absolutely wrong. An opinion written by merely citing a case probably is not worth very much. A good opinion is one that convinces somebody of something, that the final conclusion is right. And sometimes it is necessary to discuss the law.
Just to give a reference to a case, and say it holds so and so, without relating it to the ultimate conclusion, seems to me quite silly.

ANSWER (from another member of the panel): I would agree, except that if, perchance, there is a case which is what I would call an authority -- in other words, if there is a case where the facts are similar, the question is the same, and it was decided, which is very unusual, but, nevertheless, there is such a thing -- then, if you state and say, "Relying on this case as authority, I hold so and so," sometimes you can do that.

But just to cite a case and let the reader and the commission and the appellate court find its way around is very bad.

ANSWER (from another member of the panel): I suppose you have the danger of going into so much detail that the major facts almost get lost sight of, the controlling facts. Here again, I suppose one can put in some citations of precedent or things that seem close or to have persuasive value so that the controlling principle may not be lost sight of.

So that I should think, then, that threading your way between the two extremes is, once again, important, but I agree that to have the rationale and give the opinion a persuasive character is essential.

QUESTION: To what extent should agency format for opinions be disregarded in the interest of clarity and simplicity? And, I might add, in the interest of brevity?

ANSWER: Well, I would say that the use of the word "format" is misleading. Of course, any agency has a form of opinion which has grown up over the years. The form of that opinion is not what counts. What counts is what is written in the opinion. The format can be changed, but for certain purposes such as indexing, annotation, and so forth, it probably should be maintained. I do not think that many people experience any great difficulty in following the format of an opinion of a particular agency, the way they write their opinions.

I do find, however, that many of the Examiners find difficulty in writing what should be in the opinion, and they quarrel and say they cannot follow the format of the agency. I think that that has little to do with it.

The format is just the casing around the opinion, around the meat of what the Examiner is talking about, and, as far as I am concerned, he should follow the format and forget about quarreling with it, but spend his time and his effort and his thinking in writing what is within the format of that opinion.

QUESTION: Do you agree that full and fair findings can be made without casting them in the mold of a digest of testimony and exhibits?

ANSWER: Positively yes.
I do not think it is necessary to cast your findings in the mold of a recitation of the evidence. Your findings are what the evidence shows. I mean, your evidence in the form of testimony, for example, long questions and answers, sometimes is partly revealed in the direct and partly in the cross and maybe again by redirect, and maybe three or four witnesses testify about the same subject matter.

What the Trial Examiner has to do is have all that in front of him and make a finding of what are the facts proved by this evidence. That is the way you ought to do it.

ANSWER (from another member of the panel): This gets back to that other question about the format whether the format is too restrictive.

My own hunch is that the format is selected as a rough way of trying to assure that there is a certain organization of the material, and certainly there can be nothing more important that this kind of analysis and organization of the material, both in terms of the parties whose rights are being decided and in terms of the agency, which, then, must use the opinion and the decision of the trier of the facts in determining whether this should become its decision.

I think the organization of the material is one of the most important factors. I would like to ask some of our own or other Trial Examiners, if they find that this suggested format or suggested organization of the material cramps them and makes it difficult to discharge their basic responsibilities.

This might be a place where others who have had more experience with this than I have could give a far better answer.

ANSWER (from another member of the panel): Maybe I misunderstood what is meant by a format of a report. To me, it is merely the shell around -- the shell surrounding the opinion. It is some form that has grown up in an agency. You start out, maybe, with a syllabus, put in the appearances, state your issues, and end up with a finding and order.

But, within that format, the Examiner is free to rearrange his material and to handle it any way he wants. That, to me, is the thing that should be done.

All the cases do not fall within any set pattern of the way they should be handled within the report. All of them differ. There are a few, I imagine, you can use a simple form for, but in the larger cases that is not so.

But within that form, however, he can express himself any way he wants to.

QUESTION: With the requirements of Section 7 of the APA in mind: namely, to recite all of the facts forming the basis of the Examiner's findings and conclusions, with these requirements in mind, how may recital of the record and evidence be stated with the requisite brevity?
ANSWER: Well, to go all the way back to almost everything I said this afternoon, you have the finding and you have a certain amount of evidence, and half a dozen witnesses testified on the points.

You make up your mind what you believe, what you conclude from that, and then you state that finding.

Now, if you add your record references at that point, you do not have to recite the evidence. As a matter of fact, it is bad to go on and recite the evidence unless there is some point involved in the conflict of evidence that you want to recite, and how come you found this way and not the other way.

But you state your findings. That is what you are supposed to state. You state your findings. Then, if you supply your reader with the record references, he can find what you base it on.

But, as I say, sometimes you want to say, "Now, so many witnesses say this and so many witnesses say that, and I just do not believe this second set of witnesses." And often you will feel called upon to say why. You do not think that they had the opportunity, or something or other, to learn this fact, and, therefore, you take the other set. Sometimes you have to explain things like that.

But I do not hold at all that the recitation of the evidence is a necessary part of the trier's duty. He must make findings. The findings that he makes must support his conclusions.

QUESTION: To what extent should a Hearing Examiner feel bound by the agency's prior decisions when he feels that it may be incorrect or he may personally disagree with them?

ANSWER: Well, I think that it has been a practice in our agency for the Hearing Examiners to try to give deference to them, although occasionally they intimate between the lines that they may have doubts about them.

But the Board is going to be passing upon the Hearing Examiner's application of a legal principle, and if the Board is of a certain view, I think that the Hearing Examiner has some obligation to apply the law as the Board has tried to apply it until a higher authority has indicated that the Board is wrong in this matter.

Now, I do not know that this is unduly confining. It may be somewhat difficult in a period of some change. There have been intimations that the Board's own application of legal principles has been subject to some alteration. Yet, that, I think, is an obligation the Board members have to take upon themselves to reverse that past precedent. It is not unheard of in the decisions of the Board or other commissions.

I think that the Trial Examiners are bound, and I know of no other way of getting what Congress has sought for in terms of uniformity of decision across the country if we depart from that. We have a wonderful group of Hearing Examiners in the Labor Board. They are not all of
one mind, and they have fine imaginations. They have fertile legal brains. They can hatch theories as well, and in some cases better, I suppose, than members of the Board could. I think it would throw the law into great difficulty if there were not this binding effect of Board decisions upon them until the Board has been changed.

**ANSWER (from another member of the panel):** Well, I sort of disagree with my colleague here. I think that the Hearing Examiner should feel free to disagree with agency policy or agency precedent, provided that he states what that precedent or policy is, and then gives good reasons for disagreeing.

I have been with the Interstate Commerce Commission for a long while. One of the fundamental principles we have always operated on in the Interstate Commerce Commission is that everyone has a right to express his opinion.

The difficulty people get in is that they are not right when they try to depart from the Commission's policy. But whether they can convince the Commission is another matter; that is pretty hard.

I tell everyone, for heaven's sakes express your own opinion. Back it up, if you can. Good luck to you. But sometimes people are not too successful in what they write, and, therefore, they get themselves a kind of bad reputation with the practitioners.

I still say, and I say it again, that every Hearing Examiner should have the right to express what he thinks should be done with a particular case.

(Applause)

**ANSWER (from another member of the panel):** The same problem comes up, of course, in judicial circles. It is a very difficult question any way you take it.

Let us take the supreme example. You have a question that has been decided by the Supreme Court. You think the way it was answered is bad. It should not be.

Now, there are a number of ways, there are certain essentials. Your can say that in order to bring this matter before the court again or to bring it before the commission again, I am going to decide this contrary to this precedent, and I will state the reasons why I do it, and I do it so that it may come to the commission again for consideration.

Or you can say that I will follow this precedent, but I very respectfully suggest, however, that the commission might be well advised to reconsider this problem, and then give the reasons.

I have done both myself. In courts you will see sometimes one of these things and sometimes the other.

But the important part, of course, you should not do this just offhand. You should have a real, sure-enough basis. The important thing for you is to be very clear about what it is you are
doing; that you know what you are doing; you know the precedent and you know whether you are following it or not following it and state it that way, so that the commission or the court will not be misled.

QUESTION: What suggestions do any of you gentlemen have about enabling Hearing Examiners to obtain the assistance necessary to keep the index which Judge Prettyman has mentioned?

And along the same line: Who will take the responsibility for preparing the card index?

And if it is prepared, should it be made available to all the parties in the case and to the court if the case goes to court?

ANSWER: Well, I think that in time perhaps the Congress will recognize the needs of the various agencies for some additional help which can be used to make card indexes and digests of the record and so forth.

But with the President insisting on increased production and the Budget Bureau insisting on giving us no more positions, we are pressed to move our work load, and move it promptly, and still try to supply what little help we can to the Hearing Examiner.

It is purely a budgetary question.

I do not think that the Budget Bureau or the Congress has recognized the problem, ever. They do not want to hear about it. They seem to be satisfied to accept the Budget Bureau position that we do not need any more help. So far as I am concerned, I think the Hearing Examiner should have help. He should have secretaries. However, until we get the appropriations, there is not much we can do about it.

ANSWER (from another member of the panel): Well, I suppose we have difficulty just trying to run fast to succeed in standing still. The conference committee on our appropriations meets this morning, probably this afternoon. If they adhere to the House figure, it will mean a reduction of 50 positions in the Labor Board's total staff.

If they adhere to the Senate position, it may enable us to take on about 10 or 15 additional persons. Yet a work load which we estimated would increase by about six per cent, case intake, has, in the months of July and August, increased over last year by 10 per cent.

So that we are being asked to do not only the same amount, but an additional amount of work, with very little additional funds. In the case of the House, there would be additional funds, but the increases would be completely absorbed by the Pay Act increases and by the in-grade increases and would result in a reduction in staff.

There are things that members of the agency and I, as a Board member, have an obligation to try to interpret to the Bureau of the Budget and the Congress, but I suppose they have so many people trying to interpret the same thing in connection with their work, in
connection with the function that they think is important, the public function being performed by their department or by their agency, that, after a time, they become almost inured to it.

However, it is our obligation to continue to present those needs, not only in terms of the needs of an agency, but in terms of the function that needs to be performed, and of the public interest, as well as private interest, under the statutes, which needs to be protected.

QUESTION: This final question:

In your experience, in the decision of protracted cases, have you been able to formulate in your own mind immediately upon the close of the trial what the ultimate disposition of the case should be; and, if so, has your initial view squared with your ultimate disposition of the case.

ANSWER: The answer to that is very easy: sometimes yes and sometimes no.

(Applause)

DEAN KRAMER: I know I speak for all of us when I thank the three members of the panel, particularly Judge Prettyman, who has worked overtime.

We thank you all very much.

(Whereupon, at 4:30 o'clock p.m., the Conference adjourned, to reconvene at 9:00 o'clock a.m., Wednesday, September 25, 1963.)
Session 6

Alice K. Nelson, Senior Attorney
Southern Legal Counsel

Compensatory Education: Where Are We?
Compensatory Education
Alice K. Nelson
Senior Attorney
Southern Legal Counsel, Inc., Gainesville, FL

I. History and Development
   A. Title I Early Education and Secondary Act of 1965, Pub. L. 89-10
desegregation decree including order to provide remedial
education designed to compensate schoolchildren for past
effects of discrimination by supplementing their curriculum)
      2. Legislative History of 94-142

II. Equitable Remedy
      1. In any action brought under this paragraph, the court ...
         (iii) ... shall grant such relief as the court
determines is appropriate.

III. Pre-Burlington Cases
   A. *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981)
      1. There are no damages barring exceptional circumstances, e.g.,
         (1) child’s physical health would have been endangered had
         parents not made alternative arrangements to those offered by
         LEA and (2) LEA acted in bad faith by failing to comply with
         procedural safeguards; Act provides only equitable and
         prospective relief.

      1. Follows *Anderson* and also denies compensatory educational
         services on Eleventh Amendment bar against damage awards

---


1. Reads *Anderson* to permit tuition reimbursements if such relief is appropriate and relies on unreported D.C. case which held that “compensatory education is virtually indistinguishable from tuition reimbursements”

D.  *Timms v. Metropolitan Sch. Dist.*, 722 F.2d 1310 (7th Cir. 1983)

1. Explained that differences between damages and compensatory education is “not clear;”

2. Relies on *Milliken* by explaining that Supreme Court approving providing remedial education by supplementing curriculum because of past effects of discrimination; compensatory education unlike damages was prospective and therefore not barred by the Eleventh Amendment; compensatory education under the Act “entails an obligation to correct the effects of past shortfalls.

3. Note: claims dismissed for failure to exhaust.


A. Explains that “grant such relief as appropriate” includes retroactive tuition reimbursement. The Court ordered retroactive tuition reimbursement for the costs the parents paid while the case was being litigated. The standard established was that the public school IEP was inappropriate (or denial of FAPE) and the private school was appropriate. The Court further explained that reimbursement is not damages but rather requires a district to pay expenses it should have paid all along.

V.  Post-Burlington

A.  *Miener v. State of Mo.*, 800 F.2d 749 (8th Cir. 1986)

1. However, the Supreme Court's decision in Burlington,... a unanimous opinion by Mr. Justice Rehnquist, has altered our understanding of what “damages” includes in the context of the EHA (753)...

2. Unlike parents in Burlington, the Mieners could not afford a private placement. Student was place in an inappropriate
placement and now seek perspective compensatory services for the years where there was a denial of FAPE.

3. Like the retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants “merely requires [them] to belatedly pay expenses that [they] should have paid all along” [citation omitted]. Here, as in Burlington, recovery is necessary to secure the child’s right to a free appropriate public education [citation omitted]. We are confident that Congress did not intend the child’s entitlement to a free education to turn upon the parent’s ability to “front” its costs. (753)

4. Note: No relief awarded, pending outcome of determination of denial of FAPE.

VI. Definition

A. Parent of Student W. v. Puyallup Sch. Dist., 31 F3d. 1489, 1497 (9th Cir. 1994)

1. Compensatory education is an equitable remedy, which is not contractual, and is “part of the court’s resources in crafting appropriate relief.”

VII. Nature of Award

A. As correctly described in Parent of Student W., some courts have “rotely awarded a block of compensatory education equal time lost while a school district denied a free, appropriate public education...” Id. These include:


2. Burr v. Ambach, 863 F.2d 258, 1078 (2nd Cir. 1989)( awarding one and one-half years to student who was unable to attend school at all due to state errors and procedural delays.) [procedural history omitted]

3. But see Students of Parent W., 31 F.3d at 1497. no obligation to provide a day-for-day compensation for time missed.

of compensatory education is calculated by finding the period of deprivation of special education services and excluding the time reasonably required for the school district to rectify the problem.

a. The court examined various calculations of the amount of time lost and awarded the child 2428 hours of compensatory education. *Heather D.*, 511 F. Supp.2d at 555.

b. It then calculated the amount of money necessary to provide the services ($75) and converted the award to money. *Id.* The hourly award was based on the amount that the parent would have to pay for the services and not a district-determined rate. *Id.* at 560.

c. The court then reviewed the testimony of various experts as to an appropriate rate. *Id.* at 560-562.

5. See also *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 276 (awarding special sessions during school year and a four week summer program for two years or until high school graduation.

**VIII. Ninth Circuit.**

A. *Parent of Student W. v. Puyallup Sch. Dist.*, 31 F3d. 1489 (9th Cir. 1994). The Ninth Circuit’s view is summarized by one commentator as follows:

> While it appears that the Ninth Circuit would be willing to award compensatory education for either a procedural or substantive violation of the IDEA, the Puyallup ...decision[s] suggest[s] that the violations would need to be significant, and that the court would take a hard look at the facts of each case before assigning liability and awarding compensatory services.


B. *Park v. Anaheim Union High School Dist.*, 464 F.3d 1025 (9th Cir. 2006)

1. This case recognized that compensatory education may be based on procedural violation if they deprived the student “of an educational opportunity (prejudice) or seriously infringe on
his parents’ opportunity to participate in the formulation of the individualized education plan. Id. at 1032.

2. This case is also interesting because the opinion affirmed a Hearing Officer’s finding that the award directly to the student would be speculative. Instead, the Hearing Officer directed that the services be made available to the student’s special education teacher in the amount of 30 minutes per week for the remainder of a school year. The court concluded: “The...Act does not require compensatory education services to be awarded directly to the student. Id. at 1034.

IX. **Award Available to Students After the Age of Entitlement**

A. *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 189-190 (1st Cir. 1993) (permitting an award, upon proper showing, to an individual who was twenty-seven years old.) The basis for this is:

   In order to give meaning to a disabled student’s right to an education between the ages of three and twenty-one compensatory education must be available beyond a student’s twenty-first birthday. Otherwise, school districts simply could stop providing required services to older teenagers, relying on the Act’s time-consuming review process to protect them from further obligations. Although students able to front the costs of an appropriate education later could claim reimbursement ... absent a compensatory education award, courts would be powerless to aid intended beneficiaries who were over twenty-one but who had not sought out an alternative educational program.


C. *Lester H. v. Gilhool*, 916 F.2d 865, 868-869 (3rd Cir. 1990) (awarding two and a half years of compensatory education post-statutory entitlement for twelve year old)

D. *Todd D. v. Andrews*, 933 F.2d 1576, 1584 (11th Cir. 1991) (compensatory education even when student is aging out)

E. *Board of Educ. of Oak Park v. Illinois State Bd. of Educ.*, 79 F.3d 654,,660 (7th Cir. 1996) (compensatory education is a benefit that can extend beyond the age of 21)

F. *Draper v. Atlanta Independent Sch. Dist.*, 518 F.3d 1275 (11th Cir.)
2008)(affirmed an award of placement in a private school even though ALJ only provide a public school option.)

X. California Hearing Officers’ Approach

A. Parent v. Cloverdale Unified Sch. Dist, OAH Case No. 2010081062 (Jan. 20, 2011)

1. Here, compensatory education was ordered in the face of the LEA’s argument that the student had been “emotionally unavailable” to learning during some of the periods in issue. The focus was not on the past but the “Student’s ability to receive instruction now.” Id. ¶ 62. It also rejected arguments that a difficult family life had contributed to the Student’s problems and that the parents had “unclean hands.” Id. Facts, ¶¶ 63-68.

2. This case also addresses the methods of calculating awards, recognizing that an ALJ may order a mathematically calculated award based on a day-to-day or hour-to-hour basis. However, also appropriate is an approached that is based on the estimate of how much education and behavioral help the student would need in total to make up for the loss. Id. ¶ 69.

3. The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from the special education services the school district should have supplied in the first place,” which is not to be confused with the Rowley standard. [citations omitted]. Id. Law, ¶ 22.

4. This case also standards for the proposition that compensatory education may be awarded for procedural violations. See generally id. Facts, ¶ 31.

B. Parent v. Garden Grove Unified Sch. Dist, OAH Case No. 2009031077 (Jan. 11, 2010)

1. Here, the ALJ did an extensive analysis of the deprivation of a number of the services that were to have been provided to Student and awarded compensatory education based on that analysis: the provision of 43 hours of compensatory physical therapy services for the failure to provide those services; for the failure to provide transportation services during a specific period of time, reimbursement to the parent for mileage at the
rate of $.55/mile; for the failure to provide adaptive physical education during a specific period of time, hour-for-hour compensatory services; for the material failure to implement the Student’s IEP as regards AT an extra hour of per month of consultative services during a specified time period. Id. Law, ¶¶ 64-66.
Session 7

Prof. Mary B. Culbert
Loyola Law School
Center for Conflict Resolution

Mediation of Special Education Disputes
Supplemental Mediation Materials:
Ethical Standards Including Confidentiality

Presentation By Mary B. Culbert (mary.culbert@lls.edu)

I. California Code of Regulation, Title 1
   A. General Provisions
      Division 2. Office of Administrative Hearings
         Chapter 3. Agency Alternatives to Formal Hearings -
         Alternative Dispute Resolution

Article 1. General Provisions .................................................................1
   § 1200. Scope.
   § 1202. Purpose.
   § 1204. Definitions.
   § 1206. Referral to ADR.
   § 1208. Standards of Conduct for Neutrals.
   § 1210. Resumes of Neutrals.

Article 2. Mediation ................................................................. 3
   § 1212. Mediation; Definition.
   § 1214. Initiation of Mediation.
   § 1216. Appointment of Mediator.
   § 1218. Cost of Mediation.
   § 1220. Date, Time and Place of Mediation.
   § 1222. Attendance at Mediation.
   § 1224. Statements Before Mediation.
   § 1226. Confidentiality.
   § 1228. Agreements.
   § 1230. Termination of Mediation.

II. Chapter 3. General Rules Relating to Mediation of Civil Cases.............. 6
   Article 2. Rules of Conduct for Mediators in Court-Connected Mediation
   Programs for Civil Cases
      Rule 3.850. Purpose and function
      Rule 3.851. Application
      Rule 3.852. Definitions
      Rule 3.853. Voluntary participation and self-determination
      Rule 3.854. Confidentiality
Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal
Rule 3.856. Competence
Rule 3.857. Quality of mediation process
Rule 3.858. Marketing
Rule 3.859. Compensation and gifts
Rule 3.860. Attendance sheet and agreement to disclosure
Rule 3.865. Complaint procedure required
Rule 3.866. Designation of person to receive inquiries and complaints
Rule 3.867. Confidentiality of complaint procedures, information, and records
Rule 3.868. Disqualification from subsequently serving as an adjudicator

III. Chapter 4. Civil Action Mediation Program Rules ........................................17

Rule 3.870. Application
Rule 3.871. Actions subject to mediation
Rule 3.872. Panels of mediators
Rule 3.873. Selection of mediators
Rule 3.874. Attendance, participant lists, and mediation statements
Rule 3.875. Filing of statement by mediator
Rule 3.876. Coordination with Trial Court Delay Reduction Act
Rule 3.877. Statistical information
Rule 3.878. Educational material

IV. California Code of Civil Procedure §170.1 .........................................................20

V. Model Standards of Conduct for Mediators......................................................24

VI. Uniform Mediation Act ......................................................................................33


Article 7. Procedural Safeguards, §§ 3084-3098 ....................................................39

Article 7.5. Duties of Contractors or Agencies Related to Conducting Mediation or Due Process Hearings, §§ 3090-3099 .................................43
VIII. California Evidence Code ........................................................................................................52
   Division 9, Evidence Affected or Excluded by Extrinsic Policies
   Chapter 2. Mediation, §§1115-1128

IX. California Evidence Code, Division 6. Witnesses, Chapter 1.
    Competency, § Section 703.5 ....................................................................................................56

X. Cassel v. The Superior Court of Los Angeles County, 51 Cal.4th 113
   (January 13, 2011, Filed).........................................................................................................57

XI. Questions and Answers for Mediation Providers: Mediation and the
    Americans with Disabilities Act (ADA)...................................................................................81
§ 1200. Scope.
(a) This chapter applies to disputes which are the subject of adjudicative proceedings.

(b) These regulations shall be effective July 1, 1997, and shall be construed to encourage the fair and expeditious resolution of disputes.

(c) If an agency by regulation provides inconsistent rules or provides that these regulations are not applicable to that agency's proceedings, these regulations will not govern.

§ 1202. Purpose.
The purpose of Alternative Dispute (ADR) is to provide a less expensive and more satisfying alternative to administrative adjudication without diminishing the quality of justice or the parties' right to a hearing.

§ 1204. Definitions.
(a) “Agency or Agencies” refers to any agency subject to § 11410.20 of the Government Code.

(b) “Alternative dispute resolution” or “ADR” is a method, procedure, or technique used in lieu of traditional or formal adjudication to voluntarily resolve a dispute. As used in this chapter, ADR refers to mediation, non-binding arbitration, and binding arbitration.

(c) “Neutral” refers to an impartial third party who functions as a mediator or an arbitrator.

(d) “OAH” refers to the Office of Administrative Hearings in Sacramento which is the organization responsible for the administration of ADR under these regulations.

(e) Unless otherwise specified, all section references are to this chapter, Title 1, California Code of Regulations, Sections 1200 et seq.

§ 1206. Referral to ADR.
(a) Request by Party Other Than Agency. Any party, other than the Agency, interested in resolving a dispute may request ADR by applying to an Agency's Executive Officer, Director, or Agency designee. The application shall contain:

(1) an election to mediate, to arbitrate, or to use either or both procedures; and

(2) the names, addresses, telephone and fax numbers or other appropriate electronic communication addresses or numbers of all parties to the dispute and those who represent them, if known.

Filing an application constitutes consent to Agency referral of the dispute to ADR. Filing an application shall not stay any pending proceeding and shall have no effect on any procedural or substantive right of any party to the dispute, except as provided below.
(b) Request by Agency. Any Agency may refer a matter to ADR with the written consent of each party to the dispute.

(c) Agency Review of Application. Within ten working days of the receipt of an application from a party requesting ADR, the Executive Officer, Director, or designee of the Agency shall review the application to determine if the dispute is suitable for ADR. If it is determined that the dispute is suitable for ADR, the Agency shall notify each party and shall file a request for ADR with the OAH. If the Agency determines that the dispute is not suitable for ADR, the Agency shall notify each party.

(d) Lack of Consent Not Reported. A lack of consent by any party or party's representative to one or more ADR processes shall not be reported to any judge, hearing officer or presiding officer to whom the matter is assigned.

(e) Filing with the OAH. The OAH may establish filing fees or other necessary fees to cover administrative costs. The filing of a request for ADR with the OAH shall not stay any pending proceeding and shall have no effect on any procedural or substantive right of any party to a dispute unless each party agrees otherwise in writing.

§ 1208. Standards of Conduct for Neutrals.

Any Neutral participating in mediation or arbitration pursuant to these regulations shall comply in good faith with these standards. A Neutral shall indicate compliance on the Neutral's resume by appending the Neutral's signature on the sentence “I agree to comply with the California statutes and regulations governing ADR, including Government Code Sections 11420.10 through 11420.30 and regulations 1 CCR 1200 et seq. (Title 1, Division 2, Chapter 3).”

(a) Qualifications of a Neutral. Neutrals shall adhere to the highest standards of integrity, impartiality, and professional competence in rendering their professional service.

(1) Impartiality & Full Disclosure. A Neutral shall maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve equally the interests of all participants. No person shall serve as a Neutral in any dispute in which that person, that person's spouse, or immediate family has any financial or personal interest in the result of the mediation or arbitration, except by written consent of all parties. Upon accepting an appointment, the prospective Neutral shall disclose in writing any circumstance likely to create an appearance or presumption of bias or prevent a prompt meeting with the parties.

(2) Competence. A Neutral shall decline appointment, withdraw, or request technical assistance when the Neutral decides that a case is beyond the Neutral's competence. A Neutral shall maintain professional competence in mediation and/or arbitration skills including at a minimum:

(A) staying informed of and abiding by laws and regulations relevant to the practice of mediation and/or arbitration;

(B) regularly engaging in educational activities promoting professional growth.

Nothing in this section shall replace, eliminate, or render inapplicable relevant ethical standards, not in conflict with these rules, which may be imposed upon any Neutral by virtue of the Neutral's professional license or association.

(b) Responsibilities of a Neutral. A Neutral shall be truthful in advertising and soliciting ADR services. A Neutral shall make only accurate statements about the mediation and/or arbitration process, its costs and benefits, and the Neutral's qualifications. A Neutral shall be candid,
accurate, and fully responsive concerning the Neutral’s qualifications, availability, and all other pertinent matters. Upon request, a Neutral shall disclose the extent and nature of the Neutral’s training and experience.

(c) Fees. A written agreement regarding payment of mediation or arbitration fees and related costs shall be entered into by the mediator and the parties before commencement of the mediation or arbitration. Parties shall share fees and costs equally unless they agree otherwise. When setting fees, the Neutral shall ensure that they are explicit, fair, and commensurate with the service to be performed. The Neutral shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties upon request. A Neutral shall not charge contingent fees or base fees upon the outcome of the mediation or arbitration.

§ 1210. Resumes of Neutrals.

(a) Content of File. The OAH shall maintain a file containing the names and resumes of mediators and arbitrators. Information about Neutrals shall be kept on file for a minimum of one year unless the Neutral requests in writing to be removed. Neutrals may update their resumes not more than twice in a 12-month period but must update them annually to remain on file. The file shall contain a disclaimer stating “Inclusion of a resume in this file does not constitute an endorsement of a Neutral, nor should negative implications be drawn from the fact that a Neutral is not included in this file. Parties are not obligated to choose a Neutral from this file.”

(b) Content of Resumes. Resumes shall be submitted on a ADR-Resume2, revision date 8/97, available from the OAH and from the OAH Web Page (http://www.dgs.ca.gov/oah). Resumes shall include, as a minimum, qualifications, degrees, experience, areas of specialty, and fees charged. Each resume shall also contain a signed and dated statement of compliance with these regulations as specified in Section 1208. Resumes shall not be advertisements but factual information pages. The fee schedule specified in the resume shall be the fees charged for the duration of any mediation or arbitration agreed to while the resume is on file.

(c) Removal of Resumes for Cause. If a neutral does not comply with Regulation 1208, the OAH ADR administrator may remove the neutral’s resume from the file, provided that the administrator gives the neutral written notice of the intended action and affords the neutral a 10-day opportunity to respond in writing.

(d) Fees. The OAH may establish filing fees or other necessary fees to cover administrative costs of maintaining the file. The amount of such fee, if any, will be available from the OAH with the resume forms.

ARTICLE 2. MEDIATION

§ 1212. Mediation; Definition.

Mediation refers to a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is a voluntary, informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable written agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring resolution alternatives.

§ 1214. Initiation of Mediation.

Any party to a dispute may initiate mediation by filing a request for mediation as specified in Section 1206.
§ 1216. Appointment of Mediator

The parties may agree on a mediator to assist them in the resolution of their dispute.

On occasion, parties may not be able to agree on a mediator. In such a situation, each party may select 5 names either from the resumes on file with the OAH or from another source. If a mediator is chosen from another source, the party selecting that mediator shall provide OAH with a resume of that mediator. Of the names submitted to the OAH by the parties, a complete list shall be compiled and sent to the parties by the OAH. Each party may strike 3 names and return the list to the OAH within 10 calendar days. If the OAH has not received notice within this period to strike names, the OAH will assume that all names are equally acceptable. On the next working day after the 10-day period, or as soon thereafter as is practicable, the OAH will choose a mediator at random from the remaining list of names. The OAH will then notify the chosen mediator and the parties of the mediator's selection. The chosen mediator shall be sent an acceptance form to sign and return, in which the mediator must agree to abide by the applicable statutes and regulations, as described in Regulation section 1208. The acceptance form shall also state that the mediator foresees no difficulty in completing the mediation according to the schedule set out in these regulations.

If, at any time before the end of the 10-day period, the parties agree on a mediator and notify the OAH in writing, that agreed-upon mediator shall be appointed.

§ 1218. Cost of Mediation.

Compensation of the mediator and any other associated costs shall be the responsibility of the parties to the mediation. An agreement regarding compensation and costs shall be reached between the mediator and the parties before the mediation is commenced and shall be memorialized in writing.

§ 1220. Date, Time and Place of Mediation.

In consultation with the parties, the mediator shall fix the date, time and place of each mediation session. The mediation shall be held at any convenient location agreeable to the parties and the mediator. Mediation shall be completed within 60 days of the appointment of the mediator. Statutory, regulatory, and other timelines related to the dispute itself will not be affected unless by stipulation of the parties.

§ 1222. Attendance at Mediation.

All involved parties shall attend the mediation session(s). A party other than a natural person (e.g., a corporate or governmental entity or association) satisfies this attendance requirement by sending a representative familiar with the facts of the case, and that person shall have the authority to negotiate and to effectively recommend settlement to the governmental or corporate entity involved. Any party to the mediation may have the assistance of an attorney or other representative. Other persons may attend only with the permission of all parties and with the consent of the mediator.

§ 1224. Statements Before Mediation.

The mediator will determine the manner in which the issues in dispute shall be framed and addressed. The parties should expect that the mediator will request a premediation statement outlining facts, issues, and perspectives in advance of the mediation session. At the discretion of the mediator, such statements or other information may be mutually exchanged by the parties.
§ 1226. Confidentiality
Confidentiality shall be governed by Government Code Section 11420.30, and Evidence Code Sections 703.5, 1152.5, and 1152.6.

§ 1228. Agreements.
Agreements resolving the mediated dispute shall be written, signed, and dated by the parties or an authorized representative of the party or parties.

§ 1230. Termination of Mediation.
Any party or the Neutral may terminate the mediation at any time by written notice to the mediator and other parties. If any party or the Neutral terminates the mediation, or if mediation does not result in resolution, the parties shall resume the same status as before mediation and shall proceed as if mediation had not taken place.
Chapter 3. General Rules Relating to Mediation of Civil Cases

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases

Rule 3.850. Purpose and function
Rule 3.851. Application
Rule 3.852. Definitions
Rule 3.853. Voluntary participation and self-determination
Rule 3.854. Confidentiality
Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal
Rule 3.856. Competence
Rule 3.857. Quality of mediation process
Rule 3.858. Marketing
Rule 3.859. Compensation and gifts
Rule 3.860. Attendance sheet and agreement to disclosure
Rule 3.865. Complaint procedure required
Rule 3.866. Designation of person to receive inquiries and complaints
Rule 3.867. Confidentiality of complaint procedures, information, and records
Rule 3.868. Disqualification from subsequently serving as an adjudicator

Rule 3.850. Purpose and function
(a) Standards of conduct
The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.

(Subd (a) amended effective January 1, 2007.)

(b) Scope and limitations
These rules are not intended to:
(1) Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;
(2) Create a basis for challenging a settlement agreement reached in connection with mediation;
or
(3) Create a basis for a civil cause of action against a mediator.

(Subd (b) amended effective January 1, 2007.)

Rule 3.851. Application
(a) Circumstances applicable
The rules in this article apply to mediations in which a mediator:
(1) Has agreed to be included on a superior court’s list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court’s mediation program; or
(2) Has agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by that court or will be compensated by that court to mediate a case within that court’s mediation program.

(Subd (a) amended effective January 1, 2009; previously amended effective January 1, 2007.)

(b) Application to listed firms
If a court’s panel or list includes firms that provide mediation services, all mediators affiliated with a listed firm are required to comply with the rules in this article when they are notified by the court or the parties that the firm was selected from the court list to mediate a general civil case within that court’s mediation program.

(Subd (b) amended effective July 1, 2007; previously amended effective January 1, 2007.)

(c) Time of applicability
Except as otherwise provided in these rules, the rules in this article apply from the time the mediator agrees to mediate a case until the end of the mediation in that case.

(Subd (c) amended effective January 1, 2007.)

(d) Inapplicability to judges
The rules in this article do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics.

(Subd (d) amended effective January 1, 2007.)

(e) Inapplicability to settlement conferences
The rules in this article do not apply to settlement conferences conducted under rule 3.1380.

(Subd (e) amended effective January 1, 2007.)

Rule 3.851 amended effective January 1, 2009; adopted as rule 1620.1 effective January 1, 2003; previously amended and renumbered effective January 1, 2007; previously amended effective July 1, 2007.

Advisory Committee Comment
Subdivision (d). Although these rules do not apply to them, judicial officers who serve as mediators in their courts’ mediation programs are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly the rules concerning subjects not covered in the Code of Judicial Ethics such as voluntary participation and self-determination.

Rule 3.852. Definitions As used in this article, unless the context or subject matter requires otherwise:
(1) “Mediation” means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
(2) “Mediator” means a neutral person who conducts a mediation.
(3) “Participant” means any individual, entity, or group, other than the mediator taking part in a mediation, including but not limited to attorneys for the parties.
(4) “Party” means any individual, entity, or group taking part in a mediation that is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case.


Advisory Committee Comment
The definition of “mediator” in this rule departs from the definition in Evidence Code section 1115(b) in that it does not include persons designated by the mediator to assist in the mediation or to communicate with a participant in preparation for the mediation. However, these definitions are applicable only to these rules of conduct and do not limit or expand mediation confidentiality under the Evidence Code or other law.

The definition of “participant” includes insurance adjusters, experts, and consultants as well as the parties and their attorneys.

**Rule 3.853. Voluntary participation and self-determination**

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:

1. Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties;
2. Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and
3. Refrain from coercing any party to make a decision or to continue to participate in the mediation.

*Rule 3.853 amended and renumbered effective January 1, 2007; adopted as rule 1620.3 effective January 1, 2003.*

**Advisory Committee Comment**

Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case.

After informing the parties of their choices and the consequences of those choices, a mediator can invoke a broad range of approaches to assist the parties in reaching an agreement without offending the principles of voluntary participation and self-determination, including (1) encouraging the parties to continue participating in the mediation when it reasonably appears to the mediator that the possibility of reaching an uncoerced, consensual agreement has not been exhausted and (2) suggesting that a party consider obtaining professional advice (for example, informing an unrepresented party that he or she may consider obtaining legal advice). Conversely, examples of conduct that violate the principles of voluntary participation and self-determination include coercing a party to continue participating in the mediation after the party has told the mediator that he or she wishes to terminate the mediation, providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties, using abusive language, and threatening to make a report to the court about a party’s conduct at the mediation.

**Rule 3.854. Confidentiality**

(a) **Compliance with confidentiality law**

A mediator must, at all times, comply with the applicable law concerning confidentiality.

(b) **Informing participants of confidentiality**

At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.

(c) **Confidentiality of separate communications; caucuses**

If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator’s practice regarding confidentiality for separate communications with the participants.
Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.

**Use of confidential information**
A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

*Rule 3.854 renumbered effective January 1, 2007; adopted as rule 1620.4 effective January 1, 2003.*

**Advisory Committee Comment**


**Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal**

**(a) Impartiality**
A mediator must maintain impartiality toward all participants in the mediation process at all times.

**(b) Disclosure of matters potentially affecting impartiality**

1. A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include:
   - Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature; and
   - The existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.

2. A mediator’s duty to disclose is a continuing obligation, from the inception of the mediation process through its completion. Disclosures required by this rule must be made as soon as practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, such disclosures should be made before the first mediation session, but in any event they must be made within the time required by applicable court rules or statutes.

> *(Subd (b) amended effective January 1, 2007.)*

**(c) Proceeding if there are no objections or questions concerning impartiality**

Except as provided in (f), if, after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concern about the mediator’s ability to conduct the mediation impartially, the mediator may proceed.

> *(Subd (c) amended effective January 1, 2007.)*

**(d) Responding to questions or concerns concerning impartiality**

If, after a mediator makes disclosures or at any other point in the mediation process, a participant raises a question or concern about the mediator’s ability to conduct the mediation impartially, the mediator must address the question or concern with the participants. Except as provided in (f), if, after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.

> *(Subd (d) amended effective January 1, 2007.)*

**(e) Withdrawal or continuation upon party objection concerning impartiality**

In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures or discusses a participant’s question or concern regarding the mediator’s ability to
conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with the nonobjecting parties, provided that doing so would not violate any other provision of these rules, any law, or any local court rule or program guideline.

(f) Circumstances requiring mediator recusal despite party consent
Regardless of the consent of the parties, a mediator either must decline to serve as mediator or, if already serving, must withdraw from the mediation if:

1. The mediator cannot maintain impartiality toward all participants in the mediation process; or
2. Proceeding with the mediation would jeopardize the integrity of the court or of the mediation process.


Advisory Committee Comment

Subdivision (b). This subdivision is intended to provide parties with information they need to help them determine whether a mediator can conduct the mediation impartially. A mediator’s overarching duty under this subdivision is to make a “reasonable effort” to identify matters that, in the eyes of a reasonable person, could raise a question about the mediator’s ability to conduct the mediation impartially, and to inform the parties about those matters. What constitutes a “reasonable effort” to identify such matters varies depending on the circumstances, including whether the case is scheduled in advance or received on the spot, and the information about the participants and the subject matter that is provided to the mediator by the court and the parties.

The interests, relationships, and affiliations that a mediator may need to disclose under (b)(1)(A) include:
1. prior, current, or currently expected service as a mediator in another mediation involving any of the participants in the present mediation;
2. prior, current, or currently expected business relationships or transactions between the mediator and any of the participants; and
3. the mediator’s ownership of stock or any other significant financial interest involving any participant in the mediation. Currently expected interests, relationships, and affiliations may include, for example, an intention to form a partnership or to enter into a future business relationship with one of the participants in the mediation.

Although (b)(1) specifies interests, relationships, affiliations, and matters that are grounds for disqualification of a judge under Code of Civil Procedure section 170.1, these are only examples of common matters that reasonably could raise a question about a mediator’s ability to conduct the mediation impartially and, thus, must be disclosed. The absence of particular interests, relationships, affiliations, and section 170.1 matters does not necessarily mean that there is no matter that could reasonably raise a question about the mediator’s ability to conduct the mediation impartially. A mediator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under (b)(1).

Attorney mediators should be aware that under the section 170.1 standard, they may need to make disclosures when an attorney in their firm is serving or has served as a lawyer for any of the parties in the mediation. Section 170.1 does not specifically address whether a mediator must disclose when another member of the mediator’s dispute resolution services firm is providing or has provided services to any of the parties in the mediation. Therefore, a mediator must evaluate such circumstances under the general criteria for disclosure under (b)(1)—that is, is it a matter that, in the eyes of a reasonable person, could raise a question about the mediator’s ability to conduct the mediation impartially?

If there is a conflict between the mediator’s obligation to maintain confidentiality and the mediator’s obligation to make a disclosure, the mediator must determine whether he or she can make a general disclosure of the circumstances without revealing any confidential information, or must decline to serve.

Rule 3.856. Competence
(a) Compliance with court qualifications
A mediator must comply with experience, training, educational, and other requirements established by the court for appointment and retention.

(b) **Truthful representation of background**
A mediator has a continuing obligation to truthfully represent his or her background to the court and participants. Upon a request by any party, a mediator must provide truthful information regarding his or her experience, training, and education.

(c) **Informing court of public discipline and other matters**
A mediator must also inform the court if:

1. Public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency;
2. The mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending;
3. A felony charge is pending against the mediator;
4. The mediator has been convicted of a felony or of a misdemeanor involving moral turpitude; or
5. There has been an entry of judgment against the mediator in any civil action for actual fraud or punitive damages.

(d) **Assessment of skills; withdrawal**
A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

Rule 3.856 renumbered effective January 1, 2007; adopted as rule 1620.6 effective January 1, 2003.

Advisory Committee Comment

Subdivision (d). No particular advanced academic degree or technical or professional experience is a prerequisite for competence as a mediator. Core mediation skills include communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner.

A mediator must consider and weigh a variety of issues in order to assess whether his or her level of skill, knowledge, and ability is sufficient to make him or her effective in a particular mediation. Issues include whether the parties (1) were involved or had input in the selection of the mediator; (2) had access to information about the mediator’s background or level of skill, knowledge, and ability; (3) have a specific expectation or perception regarding the mediator’s level of skill, knowledge, and ability; (4) have expressed a preference regarding the style of mediation they would like or expect; or (5) have expressed a desire to discuss legal or other professional information, to hear a personal evaluation of or opinion on a set of facts as presented, or to be made aware of the interests of persons who are not represented in mediation.

Rule 3.857. Quality of mediation process

(a) **Diligence**
A mediator must make reasonable efforts to advance the mediation in a timely manner. If a mediator schedules a mediation for a specific time period, he or she must keep that time period free of other commitments.

(b) **Procedural fairness**
A mediator must conduct the mediation proceedings in a procedurally fair manner. “Procedural fairness” means a balanced process in which each party is given an opportunity to participate and
make uncoerced decisions. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.

(c) Explanation of process
In addition to the requirements of rule 3.853 (voluntary participation and self-determination), rule 3.854(a) (confidentiality), and (d) of this rule (representation and other professional services), at or before the outset of the mediation the mediator must provide all participants with a general explanation of:

(1) The nature of the mediation process;
(2) The procedures to be used; and
(3) The roles of the mediator, the parties, and the other participants.

(Subd (c) amended effective January 1, 2007.)

(d) Representation and other professional services
A mediator must inform all participants, at or before the outset of the first mediation session, that during the mediation he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.

(e) Recommending other services
A mediator may recommend the use of other services in connection with a mediation and may recommend particular providers of other services. However, a mediator must disclose any related personal or financial interests if recommending the services of specific individuals or organizations.

(f) Nonparticipants’ interests
A mediator may bring to the attention of the parties the interests of others who are not participating in the mediation but who may be affected by agreements reached as a result of the mediation.

(g) Combining mediation with other ADR processes
A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties and in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the different processes and the consequences of revealing information during any one process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring.

(h) Settlement agreements
Consistent with (d), a mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so the mediator confines the assistance to stating the settlement as determined by the parties.

(Subd (h) amended effective January 1, 2007.)

(i) Discretionary termination and withdrawal
A mediator may suspend or terminate the mediation or withdraw as mediator when he or she reasonably believes the circumstances require it, including when he or she suspects that:

(1) The mediation is being used to further illegal conduct;
(2) A participant is unable to participate meaningfully in negotiations; or
Continuation of the process would cause significant harm to any participant or a third party.

(j) Manner of withdrawal
When a mediator determines that it is necessary to suspend or terminate a mediation or to withdraw, the mediator must do so without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants.


Advisory Committee Comment
Subdivision (c). The explanation of the mediation process should include a description of the mediator’s style of mediation.

Subdivision (d). Subject to the principles of impartiality and self-determination, and if qualified to do so, a mediator may (1) discuss a party’s options, including a range of possible outcomes in an adjudicative process; (2) offer a personal evaluation of or opinion on a set of facts as presented, which should be clearly identified as a personal evaluation or opinion; or (3) communicate the mediator’s opinion or view of what the law is or how it applies to the subject of the mediation, provided that the mediator does not also advise any participant about how to adhere to the law or on what position the participant should take in light of that opinion.

One question that frequently arises is whether a mediator’s assessment of claims, defenses, or possible litigation outcomes constitutes legal advice or the practice of law. Similar questions may arise when accounting, architecture, construction, counseling, medicine, real estate, or other licensed professions are relevant to a mediation. This rule does not determine what constitutes the practice of law or any other licensed profession. A mediator should be cautious when providing any information or opinion related to any field for which a professional license is required, in order to avoid doing so in a manner that may constitute the practice of a profession for which the mediator is not licensed, or in a manner that may violate the regulations of a profession that the mediator is licensed to practice. A mediator should exercise particular caution when discussing the law with unrepresented parties and should inform such parties that they may seek independent advice from a lawyer.

Subdivision (i). Subdivision (i)(2) is not intended to establish any new responsibility or diminish any existing responsibilities that a mediator may have, under the Americans With Disabilities Act or other similar law, to attempt to accommodate physical or mental disabilities of a participant in mediation.

Rule 3.858. Marketing

(a) Truthfulness
A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf by others comply with this rule.

(b) Representations concerning court approval
A mediator may indicate in his or her marketing materials that he or she is a member of a particular court’s panel or list but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court.

(c) Promises, guarantees, and implications of favoritism
In marketing his or her mediation services, a mediator must not:
(1) Promise or guarantee results; or
(2) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.

(d) Solicitation of business
A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.
Rule 3.858 renumbered effective January 1, 2007; adopted as rule 1620.8 effective January 1, 2003.

Advisory Committee Comment

Subdivision (d). This rule is not intended to prohibit a mediator from accepting other employment from a participant while a mediation is pending, provided that there was no express solicitation of this business by the mediator and that accepting that employment does not contravene any other provision of these rules, including the obligations to maintain impartiality, confidentiality, and the integrity of the process. If other employment is accepted from a participant while a mediation is pending, however, the mediator may be required to disclose this to the parties under rule 3.855. This rule also is not intended to prohibit a mediator from engaging in general marketing activities. General marketing activities include, but are not limited to, running an advertisement in a newspaper and sending out a general mailing (either of which may be directed to a particular industry or market).

Rule 3.859. Compensation and gifts
(a) Compliance with law
A mediator must comply with any applicable requirements concerning compensation established by statute or the court.
(b) Disclosure of and compliance with compensation terms
Before commencing the mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. A mediator must abide by any agreement that is reached concerning compensation.
(c) Contingent fees
The amount or nature of a mediator’s fee must not be made contingent on the outcome of the mediation.

(Subd (c) amended effective January 1, 2007.)
(d) Gifts and favors
A mediator must not at any time solicit or accept from or give to any participant or affiliate of a participant any gift, bequest, or favor that might reasonably raise a question concerning the mediator’s impartiality.

Rule 3.859 amended and renumbered effective January 1, 2007; adopted as rule 1620.9 effective January 1, 2003.

Advisory Committee Comment

Subdivision (b). It is good practice to put mediation fee agreements in writing, and mediators are strongly encouraged to do so; however, nothing in this rule is intended to preclude enforcement of a compensation agreement for mediation services that is not in writing.
Subdivision (d). Whether a gift, bequest, or favor “might reasonably raise a question concerning the mediator’s impartiality” must be determined on a case-by-case basis. This subdivision is not intended to prohibit a mediator from accepting other employment from any of the participants, consistent with rule 3.858(d).

Rule 3.860. Attendance sheet and agreement to disclosure
(a) Attendance sheet
In each mediation to which these rules apply under rule 3.851(a), the mediator must request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers; retain the attendance sheet for at least two years; and submit it to the court on request.

(Subd (a) amended effective January 1, 2007.)
(b) Agreement to disclosure
The mediator must agree, in each mediation to which these rules apply under rule 3.851(a), that if an inquiry or a compliant is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to rule 3.865 to address that complaint or inquiry.

(Subd (b) amended effective January 1, 2007.)


Rule 3.865. Complaint procedure required

(a) Court procedures required

Each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in the court must establish procedures for receiving, investigating, and resolving complaints that mediators who are on the court’s list or who are recommended, selected, appointed, or compensated by the court failed to comply with the rules for conduct of mediators set forth in this article, when applicable.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(b) Actions court may take

The court may impose additional mediation training requirements on a mediator, reprimand a mediator, remove a mediator from the court’s panel or list, or otherwise prohibit a mediator from receiving future mediation referrals from the court if the mediator fails to comply with the rules of conduct for mediators in this article, when applicable.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 2006.)


Rule 3.866. Designation of person to receive inquiries and complaints

In each superior court that is required to establish a complaint procedure under rule 3.865, the presiding judge must designate a person who is knowledgeable about mediation to receive and coordinate the investigation of any inquiries or complaints about the conduct of mediators who are subject to rule 3.865.


Rule 3.867. Confidentiality of complaint procedures, information, and records

(a) This rule’s requirement that rule 3.865 complaint procedures be confidential is intended to:

1. Preserve the confidentiality of mediation communications as required by Evidence Code sections 1115–1128;

2. Promote cooperation in the reporting, investigation, and resolution of complaints about mediators on court panels; and

3. Protect mediators against damage to their reputations that might result from unfounded complaints against them.

(Subd (a) amended effective January 1, 2007.)

(b) All procedures for receiving, investigating, and resolving inquiries or complaints about the conduct of mediators must be designed to preserve the confidentiality of mediation communications, including but not limited to the confidentiality of any communications between the mediator and individual mediation participants or subgroups of mediation participants.
(c) All communications, inquiries, complaints, investigations, procedures, deliberations, and decisions about the conduct of a mediator under rule 3.865 must occur in private and must be kept confidential. No information or records concerning the receipt, investigation, or resolution of an inquiry or a complaint under rule 3.865 may be open to the public or disclosed outside the course of the rule 3.865 complaint procedure except as provided in (d) or as otherwise required by law.

(Subd (c) amended effective January 1, 2007.)

(d) The presiding judge or a person designated by the presiding judge for this purpose may, in his or her discretion, authorize the disclosure of information or records concerning rule 3.865 complaint procedures that do not reveal any mediation communications, including the name of a mediator against whom action has been taken under rule 3.865, the action taken, and the general basis on which the action was taken. In determining whether to authorize the disclosure of information or records under this subdivision, the presiding judge or designee should consider the purposes of the confidentiality of rule 3.865 complaint procedures stated in (a)(2) and (a)(3).

(Subd (d) amended effective January 1, 2007.)

(e) In determining whether the disclosure of information or records concerning rule 3.865 complaint procedures is required by law, courts should consider the purposes of the confidentiality of rule 3.865 complaint procedures stated in (a). Before the disclosure of records concerning procedures under rule 3.865 is ordered, notice should be given to any person whose mediation communications may be revealed.

(Subd (e) amended effective January 1, 2007.)

Rule 3.867 amended and renumbered effective January 1, 2007; adopted as rule 1622.2 effective January 1, 2006.

Advisory Committee Comment

See Evidence Code sections 1115 and 1119 concerning the scope and types of mediation communications protected by mediation confidentiality.

Subdivision (b). Private meetings, or “caucuses,” between a mediator and subgroups of participants are common in court-connected mediations, and it is frequently understood that these communications will not be disclosed to other participants in the mediation. (See Cal. Rules of Court, rule 3.854(c).) It is important to protect the confidentiality of these communications in rule 3.865 complaint procedures, so that one participant in the mediation does not learn what another participant discussed in confidence with the mediator.

Subdivisions (c)–(e). The provisions of (c)–(e) that authorize the disclosure of information and records related to rule 3.865 complaint procedures do not create any new exceptions to mediation confidentiality. Information and records about rule 3.865 complaint procedures that would reveal mediation communications should only be publicly disclosed consistent with the statutes and case law governing mediation confidentiality.

Evidence Code sections 915 and 1040 establish procedures and criteria for deciding whether information acquired in confidence by a public employee in the course of his or her duty is subject to disclosure. These sections may be applicable or helpful in determining whether the disclosure of information or records acquired by judicial officers, court staff, and other persons while receiving, investigating, or resolving complaints under rule 3.865 is required by law or should be authorized in the discretion of the presiding judge.

Rule 3.868. Disqualification from subsequently serving as an adjudicator

A person who has participated in or received information about the receipt, investigation or resolution of an inquiry or a complaint under rule 3.865 must not subsequently hear or determine any contested issue of law, fact, or procedure concerning the dispute that was the subject of the
underlying mediation or any other dispute that arises from the mediation, as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, in any court action or proceeding.


Chapter 4. Civil Action Mediation Program Rules

Rule 3.870. Application
Rule 3.871. Actions subject to mediation
Rule 3.872. Panels of mediators
Rule 3.873. Selection of mediators
Rule 3.874. Attendance, participant lists, and mediation statements
Rule 3.875. Filing of statement by mediator
Rule 3.876. Coordination with Trial Court Delay Reduction Act
Rule 3.877. Statistical information
Rule 3.878. Educational material

Rule 3.870. Application
The rules in this chapter implement the Civil Action Mediation Act, Code of Civil Procedure section 1775 et seq. Under section 1775.2, they apply in the Superior Court of California, County of Los Angeles and in other courts that elect to apply the act.


Rule 3.871. Actions subject to mediation
(a) Actions that may be submitted to mediation
The following actions may be submitted to mediation under these provisions:
(1) By court order
Any action in which the amount in controversy, independent of the merits of liability, defenses, or comparative negligence, does not exceed $50,000 for each plaintiff. The court must determine the amount in controversy under Code of Civil Procedure section 1775.5. Determinations to send a case to mediation must be made by the court after consideration of the expressed views of the parties on the amenability of the case to mediation. The court must not require the parties or their counsel to personally appear in court for a conference held solely to determine whether to send their case to mediation.
(2) By stipulation Any other action, regardless of the amount of controversy, in which all parties stipulate to such mediation. The stipulation must be filed not later than 90 days before trial unless the court permits a later time.

(Subd (a) amended effective January 1, 2007.)
(b) Case-by-case determination
Amenability of a particular action for mediation must be determined on a case-by-case basis, rather than categorically.

(Subd (b) amended effective January 1, 2007.)
Rule 3.872. Panels of mediators
Each court, in consultation with local bar associations, ADR providers, and associations of providers, must identify persons who may be appointed as mediators. The court must consider the criteria in standard 10.72 of the Standards of Judicial Administration and California Code of Regulations, title 16, section 3622, relating to the Dispute Resolution Program Act.


Rule 3.873. Selection of mediators
The parties may stipulate to any mediator, whether or not the person selected is among those identified under rule 3.872, within 15 days of the date an action is submitted to mediation. If the parties do not stipulate to a mediator, the court must promptly assign a mediator to the action from those identified under rule 3.872.


Rule 3.874. Attendance, participant lists, and mediation statements

(a) Attendance
(1) All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone as provided in (3). If a party is not a natural person, a representative of that party with authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement, must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).
(2) If any party is insured under a policy of insurance that provides or may provide coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).
(3) The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session under (1) or (2) or permit attendance by telephone. The party, attorney, or representative who is excused or permitted to attend by telephone must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission.
(4) Each party may have counsel present at all mediation sessions that concern the party.

(Subd (a) amended effective January 1, 2007; adopted as untitled subd effective March 1, 1994.)

(b) Participant lists and mediation statements
(1) At least five court days before the first mediation session, each party must serve a list of its mediation participants on the mediator and all other parties. The list must include the names of all parties, attorneys, representatives of a party that is not a natural person, insurance representatives, and other persons who will attend the mediation with or on behalf of that party. A party must promptly serve a supplemental list if the party subsequently determines that other persons will attend the mediation with or on behalf of the party.
(2) The mediator may request that each party submit a short mediation statement providing information about the issues in dispute and possible resolutions of those issues and other information or documents that may appear helpful to resolve the dispute.

(Subd (b) adopted effective January 1, 2007.)

Rule 3.875. Filing of statement by mediator
Within 10 days after conclusion of the mediation, the mediator must file a statement on Statement of Agreement or Nonagreement (form ADR-100), advising the court whether the mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case.


Rule 3.876. Coordination with Trial Court Delay Reduction Act
(a) Effect of mediation on time standards
Submission of an action to mediation under the rules in this chapter does not affect time periods specified in the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.), except as provided in this rule.

(Subd (a) amended effective January 1, 2007.)
(b) Exception to delay reduction time standards
On written stipulation of the parties filed with the court, the court may order an exception of up to 90 days to the delay reduction time standards to permit mediation of an action. The court must coordinate the timing of the exception period with its delay reduction calendar.

(Subd (b) amended effective January 1, 2007.)
(c) Time for completion of mediation
Mediation must be completed within 60 days of a reference to a mediator, but that period may be extended by the court for up to 30 days on a showing of good cause.

(Subd (c) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1994.)
(d) Restraint in discovery
The parties should exercise restraint in discovery while a case is in mediation. In appropriate cases to accommodate that objective, the court may issue a protective order under Code of Civil Procedure section 2017(c) and related provisions.

(Subd (d) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1994.)

Rule 3.877. Statistical information
(a) Quarterly information reports
Each court must submit quarterly to the Judicial Council pertinent information on:

(1) The cost and time savings afforded by mediation;
(2) The effectiveness of mediation in resolving disputes;
(3) The number of cases referred to mediation;
(4) The time cases were in mediation; and
(5) Whether mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case.

(Subd (a) amended effective January 1, 2007; previously amended effective February 9, 1999.)

(b) Submission of reports to the Judicial Council
The information required by this rule must be submitted to the Judicial Council either on the Statement of Agreement or Nonagreement (form ADR-100) and ADR Information Form (form ADR-101) or as an electronic database that includes, at a minimum, all of the information required on these forms. The format of any electronic database used to submit this information must be approved by the Administrative Office of the Courts.

(Subd (b) amended and lettered effective January 1, 2007; adopted as part of subd (a) effective March 1, 1994.)

(c) Parties and mediators to supply information
Each court must require parties and mediators, as appropriate, to supply pertinent information for the reports required under this rule.

(Subd (c) amended and relettered effective January 1, 2007; adopted as subd (b) effective March 1, 1994.)

(d) Alternative reporting method
On request, a court may report cases in mediation under the rules in this chapter under the appropriate reporting methods for cases stayed for contractual arbitration.

(Subd (d) amended and relettered effective January 1, 2007; adopted as subd (c) effective March 1, 1994.)

Rule 3.877 amended and renumbered effective January 1, 2007; adopted as rule 1638 effective March 1, 1994; previously amended effective February 9, 1999.

Rule 3.878. Educational material
Each court must make available educational material, adopted by the Judicial Council, or from other sources, describing available ADR processes in the community.


California Code of Civil Procedure
Effective: January 1, 2011

Part 1. Of Courts of Justice
    Title 2. Judicial Officers
        Chapter 3. Disqualifications of Judges

§ 170.1. Grounds for disqualification

(a) A judge shall be disqualified if any one or more of the following are true:

(1)(A) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(B) A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.
(2)(A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

(B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(i) A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

(ii) A lawyer in the proceeding was associated in the private practice of law with the judge.

(C) A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

(3)(A) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

(B) A judge shall be deemed to have a financial interest within the meaning of this paragraph if:

(i) A spouse or minor child living in the household has a financial interest.

(ii) The judge or the spouse of the judge is a fiduciary who has a financial interest.

(C) A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

(6)(A) For any reason:

(i) The judge believes his or her recusal would further the interests of justice.

(ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial.

(iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able
to be impartial.

(B) Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification.

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.

(8)(A) The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in that employment or service, and any of the following applies:

(i) The arrangement is, or the prior employment or discussion was, with a party to the proceeding.

(ii) The matter before the judge includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or an award or other final decision by a dispute resolution neutral.

(iii) The judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service.

(iv) The judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service.

(B) For the purposes of this paragraph, all of the following apply:

(i) “Participating in discussions” or “has participated in discussion” means that the judge solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral, or responded to an unsolicited statement regarding, or an offer of, that employment or service by expressing an interest in that employment or service, making an inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about that possible employment or service. If a judge's response to an unsolicited statement regarding, a question about, or offer of, prospective employment or other compensated service as a dispute resolution neutral is limited to responding negatively, declining the offer, or declining to discuss that employment or service, that response does not constitute participating in discussions.

(ii) “Party” includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the
(iii) “Dispute resolution neutral” means an arbitrator, mediator, temporary judge appointed under Section 21 of Article VI of the California Constitution, referee appointed under Section 638 or 639, special master, neutral evaluator, settlement officer, or settlement facilitator.

(9)(A) The judge has received a contribution in excess of one thousand five hundred dollars ($1500) from a party or lawyer in the proceeding, and either of the following applies:

(i) The contribution was received in support of the judge's last election, if the last election was within the last six years.

(ii) The contribution was received in anticipation of an upcoming election.

(B) Notwithstanding subparagraph (A), the judge shall be disqualified based on a contribution of a lesser amount if subparagraph (A) of paragraph (6) applies.

(C) The judge shall disclose any contribution from a party or lawyer in a matter that is before the court that is required to be reported under subdivision (f) of Section 84211 of the Government Code, even if the amount would not require disqualification under this paragraph. The manner of disclosure shall be the same as that provided in Canon 3E of the Code of Judicial Ethics.

(D) Notwithstanding paragraph (1) of subdivision (b) of Section 170.3, the disqualification required under this paragraph may be waived by the party that did not make the contribution unless there are other circumstances that would prohibit a waiver pursuant to paragraph (2) of subdivision (b) of Section 170.3.

(b) A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

(c) At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.
MODEL STANDARDS OF CONDUCT
FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005
The Model Standards of Conduct for Mediators
2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution.1 A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.2 Both the original 1994 version and the 2005 revision have been approved by each participating organization.3

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

1 The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

2 Reporter’s Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

3 The 2005 version to the Model Standards were approved by the American Bar Association’s House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.
The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.
STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator’s actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator’s actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator’s actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator’s service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
E. If a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator’s competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation.

3. A mediator should have available for the parties’ information relevant to the mediator’s training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator’s ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

   1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

   2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

   3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

   4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

   5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and
thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a
recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party’s representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator’s fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator’s impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator’s ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.
UNIFORM MEDIATION ACT

Drafted by the
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE MEETING IN ITS ONE-HUNDRED-AND-TENTH YEAR

WHITE SULPHUR SPRINGS, WEST VIRGINIA AUGUST 10 - 17, 2001

WITHOUT PREFATORY NOTE AND COMMENTS

COPYRIGHT © 2001

By

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

* The following text is subject to revision by the Committee on Style of the National Conference of Commissioners on Uniform State Laws.

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 3. DEFINITIONS. In this [Act]:

(1) “Court” means [designate a court of competent jurisdiction in this State.]

(2) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(3) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that is made or occurs during a mediation or for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.
(4) "Mediator" means an individual who conducts a mediation.

(5) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(6) "Party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(8) "Proceeding" means a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or a legislative hearing or similar process.

(9) "Record," except in the phrase "record of proceeding," means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.

(10) "Sign" includes:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record;

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

**SECTION 4. SCOPE.**

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to mediation in which:

(1) the parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the parties utilize as a mediator a person that holds itself out as providing mediation services.

(b) The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;
(2) relating to a dispute that is pending under or is part of the processes established by the collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with a public agency or court;

(3) conducted under the auspices of a primary or secondary school where all the parties are students or under the auspices of a correctional institution for youths where all the parties are residents of that institution; or

(4) conducted by a judge who might make a ruling on the case; or

(c) If the parties agree in advance that all or part of a mediation is not privileged, the privileges under Sections 5 through 7 do not apply to the mediation or part agreed upon. However, Sections 5 through 7 apply to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

SECTION 5. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) A mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

SECTION 6. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 5 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section
5, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity may not assert a privilege under section 5.

SECTION 7. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 5 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under open records act or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan, attempt to commit or commit crime, or conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party; but this exception does not apply where a case is referred by a court to mediation and a public agency participates, or a public agency participates in the mediation,

(6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or

(7) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation, except as otherwise provided in subsection (c).

(b) There is no privilege under Section 5 if a court, administrative agency, or arbitrator panel finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony or misdemeanor; or

(2) a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation, except as otherwise provided in subsection (c).

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(7) or (b)(2).
(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

SECTION 8. PROHIBITED MEDIATOR REPORTS.

(a) a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, agency, or other authority that may make a ruling on the dispute that is the subject of the mediation, but a mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under Section 7; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(b) A communication made in violation of subsection (a) may not be considered by a court or other tribunal.

(c) Subsections (d), (e), [(f)] and (g) do not apply to an individual acting as a judge.

(d) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose as soon as is practical before accepting a mediation any such fact known.

(e) If a mediator learns any fact described in subsection (d)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

[(f) A mediator must be impartial, unless after disclosure of the facts required in subsections (d) and (e) to be disclosed, the parties agree otherwise.]

(g) A person who is requested to serve as a mediator shall disclose the mediator’s qualifications to mediate a dispute, if requested to do so by a party.

(h) A person that violates subsection (d), (e), or [(f)] is precluded by the violation from asserting a privilege under Section 4.
(i) Unless required by other law of this State, no special qualification by background or profession is necessary to be a mediator under this Act.

SECTION 9. NONPARTY PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

SECTION 10. CONFIDENTIALITY. Unless subject to the open [open meetings act/open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This Act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 (c), except that nothing in this Act modifies, limits, or supersedes Section 101 (c) of that Act, nor authorizes electronic delivery of any of the notices described in Section 103 (b) of that Act.

SECTION 12. SEVERABILITY CLAUSE. If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 13. EFFECTIVE DATE. This Act takes effect .................... .

SECTION 14. REPEALS. The following acts and parts of acts are hereby repealed:

(1)

(2)

(3)

SECTION 15. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

(a) This Act governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this Act].

(b) On or after [a delayed date], this Act governs an agreement to mediate whenever made.
California Code of Regulations, Title 5. Education
Division 1. California Department of Education
Chapter 3. Handicapped Children
Subchapter 1. Special Education

Article 7. Procedural Safeguards

§ 3084. Ex Parte Communications.

(a) Notwithstanding Government Code sections 11425.10(a)(8), 11430.20, and 11430.30 of the California Administrative Procedure Act, while special education due process hearing proceedings are pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding, to a hearing officer from an employee or representative of a party or from an interested person unless the communication is made on the record at the hearing.

(b) A proceeding is pending from the date of receipt by the California Special Education Hearing Office of the request for hearing.

(c) If a hearing officer receives a communication in violation of this section, the hearing officer shall disclose the content of the communication on the record and give the parties an opportunity to address the matter if so requested within 10 days of receipt of notification of the communication.

   (1) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication.

   (2) The hearing officer has discretion to reopen a hearing that has been concluded.

(d) If a hearing officer receives a communication in violation of this section, the hearing officer shall make all of the following a part of the record in the proceeding:

   (1) If the communication is written, the writing and any written response of the hearing officer.

   (2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(e) The hearing officer shall notify all parties that the communication has been made a part of the record.

(f) Receipt by the hearing officer of a communication in violation of this section may be grounds for disqualification of the hearing officer. If the hearing officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by order of the disqualified hearing officer.

Note: Authority cited: Sections 56100(a) and (j) and 56505, Education Code. Reference: Sections 56500-56507, Education Code; Sections 11425.10, 11430.10-11430.30, 11430.50 and 11430.60, Government Code; Sections 1415(b)(2) and (c), U.S. Code, Title 20; and Sections 300.506-300.513, Code of Federal Regulations, Title 34.

§ 3085. Precedent Decisions.
Notwithstanding Government Code section 11425.10(a)(7) of the Administrative Procedure Act, orders and decisions rendered in special education due process hearing proceedings may be cited as persuasive but not binding authority by parties and hearing officers in subsequent proceedings.

Note: Authority cited: Sections 56100(a) and (j) and 56505, Education Code. Reference: Sections 56500-56507, Education Code; Section 11425.10, Government Code; Sections 1415(b)(2) and (c), U.S. Code, Title 20; and Sections 300.506-300.513, Code of Federal Regulations, Title 34.

§ 3086. Mediation.

(a) Government Code section 11420.10 of the Administrative Procedure Act does not apply to special education due process hearing procedures because Education Code sections 56500-56507 provide for mediation.

(b) Notwithstanding any other provision of law, a communication made in mediation is protected to the following extent:

(1) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under this article is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.

(2) No reference to mediation proceedings, the evidence produced, or any other aspect of the mediation may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(3) No mediator or interpreter or other participants are competent to testify in a subsequent administrative or civil proceeding as to any statement, conduct, decision, or order occurring at, or in conjunction with, the mediation.

(c) Evidence otherwise admissible outside of mediation under this section is not inadmissible or protected from disclosure solely by reason of its introduction or use in mediation under this section.

(d) Interim and final agreements in writing that result from mediation are admissible for purposes of enforcement unless the written agreement specifies otherwise.

Note: Authority cited: Sections 56100(a) and (j) and 56505, Education Code. Reference: Sections 56500-56507, Education Code; Section 11420.10, Government Code; Sections 1415(b)(2) and (c), U.S. Code, Title 20; and Sections 300.506-300.513, Code of Federal Regulations, Title 34.

§ 3087. Decision by Settlement.

Notwithstanding Government Code section 11415.60 of the Administrative Procedure Act, a decision by settlement may be issued on terms the parties determine are appropriate so long as the agreed-upon terms are not contrary to the law.

Note: Authority cited: Sections 56100(a) and (j) and 56505, Education Code. Reference: Sections 56500-56507, Education Code; Section 11415.60, Government Code; Sections 1415(b)(2) and (c), U.S. Code, Title 20; and Sections 300.506-300.513, Code of Federal Regulations, Title 34.
§ 3088. Sanctions.

(a) Provisions for contempt sanctions, order to show cause, and expenses contained in Government Code sections 11455.10-11455.30 of the Administrative Procedure Act apply to special education due process hearing procedures except as modified by (b) through (e) of this section.

(b) Only the presiding hearing officers may initiate contempt sanctions and/or place expenses at issue.

(c) Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education.

(d) The failure to initiate contempt sanctions and/or impose expenses is not appealable.

(e) The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel, to the California Special Education Hearing Office for the reasons set forth in Government Code section 11455.30(a).

Note: Authority cited: Sections 56100(a) and (j) and 56505, Education Code. Reference: Sections 56500-56507, Education Code; Sections 11455.10-11455.30, Government Code; Sections 1415(b)(2) and (c), U.S. Code, Title 20; and Sections 300.506-300.513, Code of Federal Regulations, Title 34.

§ 3088.1. Sanctions: Withholding Funds to Enforce Special Education Compliance.

(a) When a district, special education local plan area, or county office of education fails to comply substantially with a provision of law regarding special education and related services, the superintendent may withhold funds allocated to such local educational agency (LEA) under Chapter 7.2 (commencing with section 56836) of Part 30 of the Education Code and the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.). Such noncompliance may result from failure of the LEA to substantially comply with corrective action orders issued by the California Department of Education (CDE) in monitoring findings or complaint investigation reports. “Substantial noncompliance” means an incident of significant failure to provide a child with a disability with a free appropriate public education, an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program, a history of chronic noncompliance in a particular area, or a systemic agency-wide problem of noncompliance.

(b) Prior to withholding funds, the CDE shall provide written notice to the LEA, by certified mail, of the noncompliance findings that are the basis of the CDE’s intent to withhold funds. The notice shall also inform the LEA of the opportunity to request a hearing to contest the findings and the proposed withholding of funds.

(c) The notice shall include the following information:

(1) The specific past and existing noncompliance that is the basis of the withholding of funds.

(2) The efforts that have been made by the CDE to verify that all required corrective actions have been taken.
(3) The specific actions that must be taken by the LEA to bring it into compliance by an exact date to avoid the withholding of funds.

(d) The LEA shall have 30 calendar days from the date of the notice to make a written request for a hearing. The CDE shall schedule a hearing within 30 days of receipt of a request for hearing, and notify the LEA of the time and place for hearing. A hearing officer with experience in special education and with administrative hearing procedures shall be assigned by the CDE to conduct the hearing and make an audio recording of the proceeding. The hearing officer may grant continuances of the date for hearing for good cause.

(e) The LEA shall have the opportunity, prior to the hearing, to obtain all documentary evidence maintained by the CDE’s Special Education Division that supports the findings of noncompliance at issue in the notice of intent to withhold funds.

(f) Technical rules of evidence shall not apply to the hearing, but relevant written evidence or oral testimony may be submitted, and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. A decision of the hearing officer to withhold funding shall not be based solely on hearsay evidence but must be supported by evidence produced at the hearing showing substantial noncompliance with the provisions of special education law. LEA’s may be represented by counsel and the hearings will be open to the public.

(g) If a hearing is not requested, the CDE shall withhold funds as stated in the notice. If a hearing is held, a written decision shall be rendered within 30 calendar days from the date the hearing is held.

Note: Authority cited: Section 33031, Education Code. Reference: Section 56845(a), Education Code.

§ 3088.2. Enforcement and Withholding of Funds.

(a) The hearing officer shall determine, based on the totality of the evidence, whether a preponderance of the evidence supports the Department's findings of noncompliance and the determination that withholding of funds is appropriate in the particular circumstances of the case. The hearing officer's decision shall be the final decision of the Department of Education.

(b) If the Superintendent of Public Instruction determines, subsequent to withholding funds, that a local educational agency has made substantial progress toward compliance with the state law, federal law, or regulations governing the provision of special education and related services to individuals with exceptional needs, the superintendent may apportion the state or federal funds previously withheld to the local education agency.

Note: Authority cited: Section 33031, Education Code. Reference: Section 56845(b), Education Code.

§ 3089. Partial Non-Applicability of Certain Sections of the Administrative Procedure Act to Special Education Due Process Hearing Procedures.

Special education due process hearing procedures shall not be subject to the following provisions of the Administrative Procedure Act: Government Code sections 11415.60 (Decision by settlement); 11420.10 and 11420.30 (Referral of proceedings); 11425.10 (Governing procedures); 11440.10 (Authority of agency head following decision); 11440.20 (Service notice); 11440.30(b) (Conduct of hearing by electronic means); 11445.10-11445.60 (Informal hearing); 11450.05-11450.30 (Subpoenas); 11460.10-11460.70 (Emergency decision); 11465.10-11465.60 (Declaratory decisions); and 11470.10-11470.50 (Conversion of proceeding).
Article 7.5 Duties of Contractors or Agencies Related to Conducting Mediation or Due Process Hearings

§ 3090. Purpose.

Education Code section 56504.5 requires the California Department of Education (CDE) to enter into a contract with a nonprofit organization or entity or interagency agreement with another state agency to conduct mediation conferences and due process hearings in accordance with sections 300.506 and 300.511 of Title 34 of the Code of Federal Regulations. The purpose of this article is to identify the duties of the contractor or agency with whom the CDE has entered into a contract or interagency agreement pursuant to Education Code section 56504.5.


§ 3090.1. Definitions.

(a) As used in this article “agency” means the state agency with whom the CDE has entered into an interagency agreement to conduct mediation conferences and due process hearings pursuant to Education Code section 56504.5.

(b) As used in this article “conflict of interest” means a dealing or relationship that reasonably raises a question of bias.

(c) As used in this article “contractor” means the nonprofit organization or other entity with whom the CDE has entered into a contract to conduct mediation conferences and due process hearings pursuant to Education Code section 56504.5.

(d) As used in this article “forms and documents for hearings” means those forms and documents provided to the parties by the contractor or agency.

(e) As used in this article “hearing officer” means a person who, as an employee or similarly related individual of the contractor or agency, is adjudicating due process hearings pursuant to this contract or interagency agreement in accordance with Education Code section 56504.5.

(f) As used in this article “mediator” means a person who, as an employee or similarly related individual of the contractor or agency, is conducting mediations pursuant to this contract or interagency agreement in accordance with Education Code section 56504.5.


(a) The contractor or agency shall maintain and make available to interested parties a manual that describes the procedures of mediation and due process hearings.
(b) Said manual shall provide, at minimum, detailed guidance for parents and local educational agencies (LEAs) as follows:

1. How to file a due process complaint, including a model form to assist parents and guardians in filing a request for due process;
2. A description of the mediation process;
3. A description of the due process hearing process;
4. How to prepare for and participate in mediation;
5. How to prepare for a due process hearing;
6. How to properly communicate with the mediator, hearing officer, and other parties;
7. How to compel attendance of witnesses;
8. How to compel production of documents;
9. How to properly present evidence;
10. How to file and serve pre-hearing motions;
11. How to research and locate special education decisions issued by the contractor or agency; and
12. How to access all applicable statutes and regulations related to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) (20 U.S.C. Sections 1400-1482).

(c) The contractor or agency shall prepare said manual in English and, at minimum, the five foreign languages most commonly spoken in California schools as identified annually by the CDE.


§ 3092. Quarterly Reports.

(a) The contractor or agency shall file a quarterly report with CDE. The report shall be received by CDE no later than 30 calendar days after the end of the quarter. For the purposes of this section “quarter” refers to the state fiscal year which begins on July 1 of the previous calendar year and ends on June 30 of the immediately following year.

(b) Each quarterly report shall be sent to CDE via electronic mail and a duplicate copy in print to the contract monitor via United States Postal Service or independent courier.

(c) Each quarterly report shall provide CDE with information that is specified in Education Code section 56504.5(d).

(d) The quarterly report shall also contain the cumulative data from the first quarter of the current fiscal year through the end of the most recent quarter.

(e) The contractor or agency shall make all data collected pursuant to this subdivision available for placement on CDE's Web site.
(f) The contractor or agency shall report to CDE a timeline and mechanism to implement any new reporting requirements contained in the California or Federal current year's Budget Act, or any information that is required to be reported to a federal or state agency including but not limited to the Office of Special Education Programs. The contractor or agency must submit this report to the CDE within 60 calendar days from the postmark date of the CDE's written notification to the contractor or agency of such a reporting requirement.


§ 3093. Retention and Inspection of Records.

The contractor or agency shall permit CDE to audit, review, and inspect the contractor's or agency's activities, books, documents, papers, and records during the progress of the work performed pursuant to the contract or interagency agreement and for three years following final payment.


§ 3094. Committee to Advise Contractor, or Agency.

(a) The contractor or agency shall establish, and maintain an advisory committee composed of attorneys, advocates, parents, and representatives of LEAs, including school districts, county offices of education or other public educational agencies that have jurisdiction under the IDEA.

(1) The majority of the advisory committee must be any combination of parents, advocates for parents, and/or attorneys for parents.

(2) The contractor or agency is encouraged to consider the wide range of disabilities, ethnicities, races, socioeconomics, and other variables, within the special education population.

(3) The contractor or agency shall establish the total number of members and the terms of appointment for the advisory committee.

(b) The contractor or agency shall schedule meetings with the committee.

(1) These meetings shall include, at minimum, one in northern California and one in southern California, in the first half of the year, and one in northern California and one in southern California in the second half of the year, for a total of four meetings each year.

(2) The first of these meeting shall occur no later than two months after effective date of the contract/interagency agreement, or the effective date of these regulations, whichever is later.

Note: Authority cited: Section 56504.5, Education Code. Reference: Sections 56500.1, 56500.3, 56501, 56501.5 and 56504.5, Education Code

§ 3095. Availability of Translators and Translated Documents.

(a) The contractor or agency shall prepare forms and documents for mediation and due process hearings in English and, at minimum, the five foreign languages most commonly spoken in California schools as identified annually by the CDE.
(1) The contractor or agency shall publish, on its Web site, a list of all available and downloadable forms and documents.

(2) The Web site of the contractor or agency shall include a feature for requesting, by language, available forms and documents.

(b) The contractor or agency shall make available translators for all mediations and due process hearings when the language of a party or a witness to a mediation or due process hearing is other than English, or another mode of communication. The mediator or hearing officer shall make the determination of whether the interpreter is competent.

(c) The contractor or agency shall require translators and interpreters to take an oath to interpret fully and accurately.

Note: Authority cited: Section 56504.5, Education Code. Reference: Sections 56504.5 and 56506, Education Code.

§ 3096. Supervision of Mediators and Hearing Officers.

The contractor or agency shall appoint a person or persons to supervise the mediators and hearing officers dedicated to the mediations and due process hearings of Special Education disputes performed under the contract or interagency agreement.


§ 3096.1. Supervisor of Mediators.

(a) The contractor or agency shall appoint a supervisor of mediators.

(1) Qualifications of the supervisor:

(A) At least eight years of experience in the mediation of disputes arising before, during, or independently of, judicial or quasi-judicial administrative proceedings; and

(B) Experience in special education matters.

(2) Duties of the supervisor:

(A) Determine when a mediator meets the minimum qualifications established in section 3097;

(B) Include the names and qualifications of mediators who have met the requirements described in sections 3097 and 3098.1 on the public list of qualified mediators as maintained by the contractor or agency pursuant to 20 U.S.C. Section 1415(e)(2)(C);

(C) Review and approve the initial training and continuing education programs described in section 3098.1;

(D) Supervise the work of all mediators; and

(E) Evaluate each mediator not less than once every 12 months.

§ 3096.2. Supervisor of Hearing Officers.

(a) The contractor or agency shall appoint a supervisor of hearing officers.

(b) Qualifications of the supervisor:

(1) At least eight years of experience in the practice of law in civil or criminal trial courts, appellate courts, or quasi-judicial administrative proceedings; and

(2) Significant experience in special education matters.

(c) Duties of the supervisor:

(1) Determine when a hearing officer meets the minimum qualifications established in section 3097;

(2) Include the names and qualifications of hearing officers who have met the requirements described in sections 3097 and 3098.2 on the public list of qualified hearing officers as maintained by the contractor or agency pursuant to 34 C.F.R. Section 300.511(c)(3) and Education Code section 56505(m);

(3) Review and approve the initial training and continuing education programs described in section 3098.2;

(4) Supervise the work of all hearing officers;

(5) Evaluate each hearing officer not less than once every twelve months; and

(6) Review the decisions of hearing officers to ensure that the decisions are clear, concise, logical, well-reasoned, supported by appropriate legal authority, and address all issues required to be decided.

(A) The contractor or agency shall provide a description of the quality control mechanism used by the supervisor to the contract monitor at a time determined in the contract or agreement.

(B) The control mechanism shall ensure that the hearings are fair and decisions are accurate.

(C) The review of a hearing officer's decision shall not involve altering the findings of fact, conclusions of law or hearing outcomes.


§ 3097. Minimum Qualifications for Mediators and Hearing Officers.

All mediations and due process hearings shall be conducted by a mediator or hearing officer who has demonstrated to his or her supervisor that he or she satisfies the requirements set forth in Education Code Chapter 5 of Part 30, commencing with section 56500.


§ 3098. Training for Mediators and Hearing Officers.
In addition to the “Minimum Qualifications” set forth in section 3097, all mediators and hearing officers must complete the training requirements set forth in sections 3098.1(a) and (b) or 3098.2(a) and (b) prior to conducting a mediation or due process hearing.

Note: Authority cited: Sections 56504.5 and 56505, Education Code. Reference: Sections 56500.3, 56504.5 and 56505, Education Code; 20 U.S.C. Section 1415; and 34 C.F.R. Section 300.506.

§ 3098.1. Training for Mediators.

(a) A mediator shall complete at least 20 hours of training in mediation theory, techniques, and practices, which may include practical, clinical, or simulated training and shall include, but not be limited to, the following subjects:

(1) Mediation purposes;
(2) Evaluating cases for mediation;
(3) Mediation and mediator's ethics;
(4) Confidentiality in and after mediation;
(5) Negotiation theory;
(6) Approaches to conflict resolution;
(7) Preparation for mediation;
(8) Mediator's opening;
(9) Stages of mediation;
(10) Identification and narrowing of issues;
(11) Communications skills;
(12) Use of caucuses;
(13) Strategies for dealing with recurring mediation problems;
(14) Recognizing opportunities in mediation;
(15) Recognizing and dealing with impasse and closure;
(16) Multi-party mediation;
(17) Post-mediation issues; and
(18) Resources for mediators.

(b) In addition to the initial training identified in the immediately preceding subdivision (a) and prior to conducting a mediation, a mediator shall complete at least 20 hours of training in special education disputes, which may include practical, clinical, or simulated training, and which shall include, but not be limited to, the following subjects:
(1) The substantive and procedural laws relating to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) (20 U.S.C. Section 1400-1482), including, but not limited to:

(A) Federal and state regulations pertaining to IDEIA and legal interpretations of this Act by federal and state courts;

(B) Education Code Title 2, Division 4, Part 30, commencing with section 56000 and implementing regulations; and

(C) Related federal and state statutes, regulations and court and administrative rulings interpreting or implementing all of the above.

(2) Common disabilities and their impact on human functioning;

(3) The impact of common disabilities on students in an educational environment;

(4) Disability awareness,

(5) Options for the accommodation of disabilities in education and elsewhere;

(6) Services and supports available to students with exceptional needs;

(7) Adaptation of general techniques to special education disputes;

(8) Participation of children with exceptional needs in special education disputes; and

(9) Participation of parents, guardians, and representatives of children with exceptional needs in special education disputes.

(c) In addition to the initial 40 hours of training described in the immediately preceding subdivisions (a) and (b), a mediator shall complete at least 20 hours of continuing education during each fiscal year. This continuing education shall include training in mediation and the mediation of special education disputes, which may include practical, clinical or simulated training and which shall include but not be limited to, further study of, and developments in, the subjects set forth in the immediately preceding subdivisions (a) and (b).

Note: Authority cited: Section 56504.5, Education Code. Reference: Sections 56500.3 and 56504.5, Education Code; 20 U.S.C. Section 1415; and 34 C.F.R. Section 300.506.

§ 3098.2. Training for Hearing Officers.

(a) Prior to acting as a hearing officer, a hearing officer shall receive 80 hours of training in adjudication of administrative matters, which shall include, but not be limited to, the following subjects:

(1) Due process and the role of the hearing officer;

(2) Ethical requirements for hearing officers;

(3) Creating and maintaining a bias-free proceeding;

(4) Case management;

(5) Motions and other pre-hearing practices and procedures;
(6) Settlement practice;
(7) Hearing preparation;
(8) Making, completing, supplementing, and preserving a record;
(9) Opening and closing a hearing;
(10) Hearing room control and demeanor;
(11) Strategies for protecting the rights of parties not represented by attorneys;
(12) Dealing with a party's default;
(13) Handling and preserving documents and exhibits;
(14) Credibility of witnesses;
(15) Qualifying and evaluating expert witnesses;
(16) Common evidentiary issues in administrative proceedings;
(17) Closing briefs and arguments and submission;
(18) Writing decisions; and
(19) Resources for hearing officers.

(b) As part of the 80 hours of training set forth in the immediately preceding subdivision (a), a hearing officer's initial training shall include at least 20 hours of training in the adjudication of special education disputes, which may include practical, clinical or simulated training and which shall include, but not be limited to, the following subjects:

(1) The substantive and procedural laws relating to 20 U.S.C. Chapter 33, commencing with section 1400;
(2) The substantive and procedural laws relating to 34 C.F.R. Part 300 commencing with section 300.1;
(3) The substantive and procedural laws relating to Education Code, Title 2, Division 4, Part 30, commencing with section 56000;
(4) The substantive and procedural laws relating to California Code of Regulations, Title 5, division 1, chapter 3, subchapter 1, commencing with section 3000;
(5) Federal and state statutes and regulations related to the laws and regulations identified in subdivision (b)(1)-(4);
(6) Court and administrative rulings interpreting or implementing all of the above;
(7) Common disabilities and their impact on human functioning;
(8) The impact of common disabilities on students' academic, development and functional needs in an educational environment;
(9) Disability awareness;

(10) Options for the accommodation of disabilities in education and elsewhere;

(11) Services and supports available to students with exceptional needs;

(12) Adaptation of general education strategies for students with disabilities;

(13) Participation of children with exceptional needs in special education disputes;

(14) Participation of parents, guardians, and representatives of children with exceptional needs in special education disputes; and

(15) Participation of teachers, instructional assistants, educational support personnel, and administrators in special education disputes.

(c) In addition to the initial 80 hours of training, a hearing officer shall complete at least 20 hours of continuing education during each fiscal year. This continuing education shall include continuing education in the adjudication of administrative disputes and special education disputes, which may include practical, clinical, or simulated training and which shall include, but not be limited to, the subjects set forth in the immediately preceding subdivisions (a) and (b).

Note: Authority cited: Sections 56504.5 and 56505, Education Code. Reference: Sections 56501, 56504.5, 56505 and 56505.1, Education Code; 20 U.S.C. Section 1415; and 34 C.F.R. Section 300.511.

§ 3099. Preventing Conflicts of Interest for Mediators and Hearing Officers.

(a) The contractor or agency shall require mediators and hearing officers to prevent conflicts of interest.

(b) The contractor or agency shall require mediators and hearing officers to disclose all actual and potential conflicts of interest reasonably known to him or her and that could reasonably be seen as raising a question about impartiality.

(c) Any involvement by a mediator or hearing officer with the subject matter of the dispute or any relationship between a mediator or hearing officer with any party, prospective participant, or prospective witness, whether past or present, personal or professional, that reasonably raises a question of the mediator's or hearing officer's impartiality shall be disclosed by the mediator or hearing officer to the parties as soon as practicable after the mediator or hearing officer becomes aware of such circumstance.

(d) The contractor or agency, in the event of an actual or potential conflict, shall require the mediator or hearing officer to decline to mediate or adjudicate the dispute, unless all parties choose to retain him or her.

California Evidence Code
Division 9. Evidence Affected or Excluded by Extrinsic Policies
Chapter 2. Mediation

§ 1115. Definitions

For purposes of this chapter:

(a) “Mediation” means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) “Mediator” means a neutral person who conducts a mediation. “Mediator” includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

§ 1116. Effect of chapter

(a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

§ 1117. Application of chapter

(a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

1. A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.


§ 1118. Oral agreements

An oral agreement “in accordance with Section 1118” means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter or reliable means of audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.
(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

§ 1119. Written or oral communications during mediation process; admissibility

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

§ 1120. Evidence otherwise admissible

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

§ 1121. Mediator's reports and findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

§ 1122. Communications or writings; conditions to admissibility

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.
(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

§ 1123. Written settlement agreements; conditions to admissibility

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

§ 1124. Oral agreements; conditions to admissibility

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

§ 1125. End of mediation; satisfaction of conditions

(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more
than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

§ 1126. Protections before and after mediation ends

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

§ 1127. Attorney's fees and costs

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

§ 1128. Subsequent trials; references to mediation

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.
California Evidence Code
Division 6. Witnesses
Chapter 1. Competency

§ 703.5. Judges, arbitrators or mediators as witnesses; subsequent civil proceeding

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.


S178914

SUPREME COURT OF CALIFORNIA

51 Cal. 4th 113; 2011 Cal. LEXIS 2

January 13, 2011, Filed


PRIOR HISTORY: [**1]

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court excluded a client's mediation-related evidence in a suit asserting legal malpractice and related causes of action. The client agreed in mediation to a settlement of business litigation. Thereafter, he sued his attorneys alleging that they had obtained his consent to the settlement through bad advice, deception, and coercion and that they had a conflict of interest. The trial court granted the attorneys' motion to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and the attorneys' efforts to persuade the client to reach a settlement in the mediation. (Superior Court of Los Angeles County, No. LC070478, William A. MacLaughlin, Judge.) The Court of Appeal, Second Dist., Div. Seven, No. B215215, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the mediation-related discussions were confidential because they were for the purpose of, in the course of, or pursuant to, a mediation (Evid. Code, § 1119, subds. (a), (b)). There is no exception to mediation confidentiality where a client seeks to use confidential communication as evidence in a legal malpractice suit. Confidentiality is not limited to communications between mediation participants or within the mediation proceedings (Evid. Code, § 1122, subd. (a)(2)), and an analogy to the exception from the attorney-client privilege (Evid. Code, § 958) was inapposite. Due process was not implicated. (Opinion by Baxter, J., with Kennard, Acting C. J., Werdegar, Moreno, Corrigan, JJ., and George, J., concurring. Concurring opinion by Chin, J. (see p. 138).) [*114]

* Retired Chief Justice of California, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
(1) Evidence § 26--Admissibility--Mediation--Exceptions to Confidentiality.--Exceptions to the mediation confidentiality requirements (Evid. Code, § 1119) are made for oral or written settlement agreements reached in mediation if the statutory requirements for disclosure are met (Evid. Code, §§ 1118, 1123, 1124).

(2) Evidence § 26--Admissibility--Mediation--Waiver of Confidentiality.--Under Evid. Code, § 1122, participants in a mediation may, by the means set forth in the statute, waive, at least in part, the confidentiality of otherwise protected mediation-related communications.

(3) Evidence § 26--Admissibility--Mediation--Exceptions to Confidentiality.--The purpose of California's mediation confidentiality statutes is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant. Toward that end, the statutory scheme unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception. Judicial construction, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms. Where competing policy concerns are present, it is for the Legislature to resolve them.

(4) Evidence § 26--Admissibility--Mediation--Exceptions to Confidentiality.--The Legislature intended the unambiguous provisions of California's mediation confidentiality statutes to be applied broadly. Exceptions are limited to narrowly proscribed statutory exemptions. Except in cases of express waiver or where due process is implicated, mediation confidentiality must be strictly enforced, even where competing policy considerations are present.

(5) Evidence § 26--Admissibility--Mediation--Discussions with Counsel.--Evid. Code, § 1119, subd. (a), extends to oral communications made for the purpose of or pursuant to a mediation, not just to oral communications made in the course of the mediation. The obvious purpose of the expanded language is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered, if they are made for the purpose of, or pursuant to, a mediation (§ 1119, subds. (a), (b)). It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.

(6) Evidence § 26--Admissibility--Mediation--Scope of Confidentiality.--Evid. Code, § 1119, subds. (a), (b), do not restrict confidentiality to communications between mediation participants. They provide more broadly that no evidence of anything said and no writing is discoverable or admissible in a legal proceeding if the utterance or writing was for the purpose of, in the course of, or pursuant to, a mediation.
The protection afforded by these statutes is not limited by the identity of the communicator, by his or her status as a party, disputant, or participant in the mediation itself, by the communication's nature, or by its specific potential for damage to a disputing party.

(7) Evidence § 26--Admissibility--Mediation--Participants.--"Participants" are not defined in the statutory text of California's mediation confidentiality statutes, but they are mentioned at several points in the statutory scheme, under circumstances making clear that the term "participants" includes more than the mediation parties or disputants.

(8) Evidence § 26--Admissibility--Mediation--Lawsuits Between Attorney and Client.--California's mediation confidentiality statutes do not create a privilege in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. To assure this maximum privacy protection, the Legislature has specified that all mediation participants involved in a mediation-related communication [*116] must agree to its disclosure. Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client.

(9) Evidence § 26--Admissibility--Mediation--Legal Malpractice Actions.-- The language of California's mediation confidentiality statutes includes every oral or written communication by any person that occurs for the purpose of, in the course of, or pursuant to, a mediation (Evid. Code, § 1119, subds. (a), (b)). That broad rule does not become inapplicable in cases where a client seeks disclosure of the confidential communication as evidence in a legal malpractice action against his or her attorneys.

(10) Evidence § 26--Admissibility--Mediation--Legal Malpractice Actions.-- Even if a private attorney-client conversation did not occur in the course of a mediation, this circumstance is not enough to exempt the communication from confidentiality, because the statutory protections also encompass communications made for the purpose of or pursuant to mediation. The latter phrases must necessarily include statements that were not made in the course of the mediation itself, or those additional provisions would be superfluous. Communications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator, are for the purpose of or pursuant to mediation. Indeed, if protected communications did not include those outside the mediation proceedings, it would be unnecessary and useless for Evid. Code, § 1122, subd. (a)(2), to provide that communications by and between fewer than all participants in a mediation may be disclosed if all such participants agree and the communication does not disclose anything said or done in the course of
Further, application of California's mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds. The mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest.

(11) Evidence § 26--Admissibility--Mediation--Legal Malpractice Actions--Attorney-client Communications.--Evidence of private communications between an attorney and a client related to mediation, which the trial court ruled nondiscoverable and inadmissible by reason of California's mediation confidentiality statutes in a legal malpractice action, was not, as a matter of law, excluded from coverage by those [*117] statutes on the mere ground that they were private attorney-client communications that occurred outside the presence or hearing of the mediator or any other mediation participant. Instead, such attorney-client communications, like any other communications, were confidential, and therefore were neither discoverable nor admissible--even for purposes of proving a claim of legal malpractice--insofar as they were for the purpose of, in the course of, or pursuant to, a mediation (Evid. Code, § 1119, subd. (a)). By holding otherwise, and thus overturning the trial court's exclusionary order, the Court of Appeal erred.

[Cal. Forms of Pleading and Practice (2010) ch. 31, Mediation, § 31.13.]


Sauer & Wagner, Gerald L. Sauer and Laurie B. Hiller for John Porter and Deborah Blair Porter as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.


Robie & Matthai, Kyle Kveton and Steven Fleischman for Association of Southern California Defense Counsel as Amicus Curiae on behalf of Real Parties in Interest.


OPINION BY: Baxter

OPINION

BAXTER, J.--In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. [**2] With specified statutory exceptions, neither "evidence of anything said," nor any "writing," is discoverable or admissible "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which ... testimony can be compelled to be given," if the statement was made, or the writing was prepared, "for the purpose of, in the course of, or pursuant to, a mediation ... ." (Evid. Code, § 1119, subds. (a), (b)). "All communications, [*118] negotiations, or settlement discussions by and between participants in the course of a mediation ... shall remain confidential." (Id., subd. (c)). We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they

1 All further unlabeled statutory references are [**3] to the Evidence Code.

The issue here is the effect of the mediation confidentiality statutes on private discussions between a mediating client and attorneys who represented him in the mediation. Petitioner Michael Cassel agreed in mediation to the settlement of business litigation to which he was a party. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.

Prior to trial, defendant attorneys moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement in the mediation. The trial court granted the motion, but the Court of Appeal vacated the trial court's order.

The appellate court majority reasoned that the mediation confidentiality statutes are intended to prevent the damaging use against [**4] a mediation disputant of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients. Thus, the majority concluded, when a mediation disputant sues his own counsel for malpractice in connection with the mediation, the attorneys--already freed, by reason of the malpractice suit, from the attorney-client privilege--cannot use mediation confidentiality as a shield to exclude damaging evidence of their own entirely private conversations with the client. The dissenting justice urged that the majority had crafted an unwarranted judicial exception to the clear and absolute provisions of the mediation confidentiality statutes.

Though we understand the policy concerns advanced by the Court of Appeal majority, the plain language of the statutes compels us to agree with [*119] the dissent. As we will explain, the result reached by the majority below contravenes the Legislature's explicit command that, unless the confidentiality of a particular communication is expressly waived, under statutory procedures, by all mediation "participants," or at least by all those "participants" by or for whom it was prepared [**5] (§ 1122, subd. (a)(1), (2)), things said or written "for the purpose of" and "pursuant to" a mediation shall be inadmissible in "any ... civil action." (§ 1119, subds. (a), (b).) As the statutes make clear, confidentiality, unless so waived, extends beyond utterances or writings "in the course of" a mediation (ibid.), and thus is not confined to communications that occur between mediation disputants during the mediation proceeding itself.
We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice. (See Foxgate, supra, 26 Cal.4th 1, 17; Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137, 163 [61 Cal. Rptr. 3d 200] (Wimsatt).) Accordingly, we will reverse the judgment of the Court of Appeal.

FACTS AND PROCEDURAL BACKGROUND

On February 3, 2005, petitioner filed a complaint against defendants and real parties in interest Wasserman, Comden, Casselman & Pearson, L.L.P., a law firm (WCCP), and certain of its members, including attorneys Steve Wasserman and David Casselman (hereafter collectively real parties). (Cassel v. Wasserman, Comden, Casselman & Pearson, L.L.P. (Super. Ct. L.A. County, No. LC070478).) The complaint alleged that real parties, petitioner's retained attorneys, had breached their professional, fiduciary, and contractual duties while representing petitioner in a third party dispute over rights to the Von Dutch clothing label.

The complaint asserted the following: In 1996, petitioner acquired a "global master license" (GML) to use the Von Dutch label, and he founded a company, Von Dutch Originals, L.L.C. (VDO), to sell clothing under that name. In 2002, WCCP began representing petitioner in a dispute over ownership of VDO. Petitioner lost an arbitration resolving that dispute, but the rights to the GML were not determined. Thereafter, petitioner did business in accordance with WCCP's advice that the GML still entitled him to market clothing under the Von Dutch label. These activities caused VDO to sue petitioner for trademark infringement (the VDO suit). WCCP did not inform petitioner that, in connection with the VDO suit, VDO sought a preliminary injunction against his use of the Von Dutch label. When WCCP failed to oppose the injunction request, it was granted.

The complaint continued: Repeatedly assured by WCCP that the VDO injunction applied only within the United States, petitioner struck a deal to market Von Dutch clothing in Asia. Around the same time, Steve Wasserman, a silent partner in his son's online sales business, persuaded petitioner to provide genuine Von Dutch hats for sale through the son's business. Petitioner later learned this business was also selling counterfeit Von Dutch goods. Citing both the Asian agreement and the online sales as violations of the VDO injunction, VDO sought a finding of contempt against petitioner. In discovery relating to the VDO suit and the contempt motion, VDO deposed Steve Wasserman about the online sales of counterfeit Von Dutch merchandise. Wasserman thus assumed the conflicting roles of counsel and witness in the same case.

Further, the complaint asserted: A pretrial mediation of the VDO suit began at 10:00 a.m. on August 4, 2004. Petitioner attended the mediation, accompanied by his assistant, Michael Paradise, and by WCCP lawyers Steve Wasserman, David Casselman, and Thomas Speiss. Petitioner and his attorneys had previously agreed he would take no less than $2 million to resolve the VDO suit by assigning his GML rights to VDO. However, after hours of mediation negotiations, petitioner was finally told VDO would pay no more than $1.25 million. Though he felt increasingly
tired, hungry, and ill, his attorneys insisted he remain until the mediation was concluded, and they pressed him to accept the offer, telling him he was "greedy" to insist on more. At one point, petitioner left to eat, rest, and consult with his family, but Speiss called and told petitioner he had to come back. Upon his return, his lawyers continued to harass and coerce him to accept a $1.25 million settlement. They threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him they could and would negotiate a side deal that would recoup deficits in the VDO settlement itself. They also falsely said they would waive or discount a large portion of his $188,000 legal bill if he accepted VDO's offer. They even insisted on accompanying him to the bathroom, where they continued to "hammer" him to settle. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, the attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement.

In his May 2007 deposition, petitioner testified about meetings with his attorneys immediately preceding the mediation, at which mediation strategy was discussed, and about conversations with his lawyers, outside the presence of the other mediation participants, during the mediation session itself. Petitioner's deposition testimony was consistent with the complaint's claims that his attorneys employed various tactics to keep him at the mediation and to pressure him to accept VDO's proffered settlement for an amount he and the attorneys had previously agreed was too low.

Thereafter, real parties moved in limine under the mediation confidentiality statutes to exclude all evidence of communications between petitioner and his attorneys that were related to the mediation, including matters discussed at the premediation meetings and the private communications among petitioner, Paradise, and the WCCP lawyers while the mediation was underway. A hearing on the motion took place on April 1 and 2, 2009. The trial court examined petitioner's deposition in detail and heard further testimony from David Casselman.

At length, the court ruled that, in addition to information about the conduct of the mediation session itself, the following evidence was protected by the mediation confidentiality statutes and would not be admissible: (1) discussions between petitioner and WCCP attorneys on April 2, 2004, concerning plans and preparations for the mediation, mediation strategy, and amounts petitioner might be offered, and would accept, in settlement at the mediation; (2) similar discussions between petitioner and WCCP attorneys on April 3, 2004; (3) all private communications among petitioner, Paradise, and WCCP attorneys on April 4, 2004, during the mediation, concerning (a) the progress of the session, (b) settlement offers made, (c) petitioner's departure from the mediation over the objection of WCCP attorneys and their efforts to secure his return, (d) recommendations by WCCP lawyers that petitioner accept VDO's $1.25 million offer, (e) their accusations that he was "greedy" for considering $5 million as an appropriate amount, (f) who would try the case if petitioner did not settle the VDO suit, (g) a possible deal, if petitioner settled, to acquire an interest in VDO for him through the pending divorce of VDO's owner, and (h) WCCP's willingness to reduce its fees if petitioner settled the suit. The court also
ruled inadmissible, as communicative conduct, the act of a WCCP attorney in accompanying petitioner to the bathroom during the mediation.

Petitioner sought mandate. The Court of Appeal issued an order to show cause why the trial court's order should not be vacated. After real parties filed a return to the petition, and petitioner filed a reply, the Court of Appeal granted mandamus relief.

The majority reasoned as follows: The mediation confidentiality statutes do not extend to communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation. The purpose of mediation confidentiality is to allow the disputing parties in a mediation to engage in candid discussions with each other about their respective positions, and the strengths and weaknesses of their respective cases, without fear that the matters thereby disclosed will later be used against them. This protection was not intended to prevent a client from proving, through private communications outside the presence of all other mediation participants, a case of legal malpractice against the client's own lawyers. Moreover, a mediation disputant and the disputant's attorneys are a single mediation "participant" for purposes of the mediation confidentiality statutes. Thus, an attorney cannot block the client's disclosure of private attorney-client communications by refusing, as a separate "participant," to waive any mediation confidentiality that might otherwise apply. (See § 1122, subd. (a)(2).) Were this not so, the mediation confidentiality statutes would unfairly hamper a malpractice action by overriding the waiver of the attorney-client privilege that occurs by operation of law when a client sues lawyers for malpractice. (See § 958.)

In dissent, Presiding Justice Perluss argued that the majority had crafted a forbidden judicial exception to the clear requirements of mediation confidentiality. The dissent reasoned as follows: By their plain terms, subdivisions (a) and (b) of section 1119 do not simply protect oral or written communications "in the course of" mediation--i.e., those made to the mediator, to other mediation disputants, or to persons participating in the mediation on behalf of such other disputants. Instead, the statutes also include within their protection communications made "for the purpose of" mediation. Thus, even unilateral mediation-related discussions between a disputant and the disputant's own attorneys are confidential. Moreover, unless all mediation participants waive confidentiality, the protection applies even if the communications do not reveal anything about the content of the mediation proceedings themselves. The latter conclusion flows from section 1122, subdivision (a)(2), which allows fewer than all participants in the mediation to waive, by an express writing or recorded oral statement, the confidentiality of an oral or written communication prepared solely for their benefit, but only if the communication "does not disclose anything said or done ... in the course of the mediation." Applying the mediation confidentiality statutes in accordance with their plain meaning to protect private mediation-related discussions between a mediation disputant and the disputant's attorneys may indeed hinder the client's ability to prove a legal malpractice claim against the lawyers. However, it is for the Legislature, not the courts, to balance the competing policy concerns.

We granted review. [*123]

DISCUSSION:

2 John and Deborah Blair Porter have submitted an amicus curiae brief
on behalf of petitioner. The Association of Southern California Defense Counsel has submitted an amicus curiae brief on behalf of real parties.

As below, real parties urge that under the plain language of the mediation confidentiality statutes, their mediation-related discussions with petitioner are inadmissible in his malpractice action against them, even if those discussions occurred in private, away from any other mediation participant. Petitioner counters that the mediation confidentiality statutes do not protect such private attorney-client communications—even if they occurred in connection with a mediation—against the client’s claims that the attorneys committed legal malpractice. As we will explain, we agree with real parties.

3 As the Court of Appeal majority declared, "The question presented is whether, as a matter of law, [**15] mediation confidentiality requires exclusion of conversations and conduct solely between a client, [petitioner], and his attorneys, [WCCP], on August 2, 3, and 4, 2004[,] during meetings in which they were the sole participants and which were held outside the presence of any opposing party or [the] mediator." (Italics added.) Thus, we need not, and do not, review the trial court's factual determinations that the communications it excluded from discovery and evidence were mediation related, and thus within the purview of the mediation confidentiality statutes. As the Court of Appeal dissent pointed out, petitioner "does not argue ... that the trial court abused its discretion in concluding, after carefully reviewing each of the statements at issue here, that they were materially related to the mediation ..., and that issue is not properly before us." We frame our discussion accordingly.

Pursuant to recommendations of the California Law Revision Commission, the Legislature adopted the current version of the mediation confidentiality statutes in 1997. (Simmons, supra, 44 Cal.4th 570, 578.) The statutory purpose is to encourage the use of mediation by promoting "'... a candid and informal [**16] exchange regarding events in the past ... . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes." [Citations.]' (Foxgate, supra, 26 Cal.4th 1, 14 ... .)" (Simmons, supra, at p. 578.)

(I) Section 1119 governs the general admissibility of oral and written communications generated during the mediation process. Subdivision (a) provides in pertinent part that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any ... civil action ... ." (Italics added.) Subdivision (b) similarly bars discovery or admission in evidence of any "writing ... prepared for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any ... civil action ... ." (Italics added.) Subdivision (c) of section 1119 further provides that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation ... shall remain confidential." [*124] (Italics added.) Exceptions are made for oral [**17] or written settlement agreements reached in mediation if the statutory requirements for disclosure are met. (§§ 1118, 1123, 1124; see Simmons, supra, 44 Cal.4th 570, 579.)
(2) Under section 1122, "participants" in the mediation may, by the means set forth in the statute, waive, at least in part, the confidentiality of otherwise protected mediation-related communications. Subdivision (a)(1) of section 1122 provides that all "who ... participate" in a mediation may "expressly agree in writing," or orally if statutory requirements are met, "to disclosure of [a] communication, document, or writing." Subdivision (a)(2) provides that if a "communication, document, or writing was prepared by or on behalf of fewer than all of the mediation participants, those participants [may] expressly agree in writing," or orally if statutory requirements are met, to disclosure of the communication, document, or writing, so long as "the communication, document, or writing does not disclose anything said or done ... in the course of the mediation." (Italics added.)

(3) As noted above, the purpose of these provisions is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant. "Toward that end, 'the statutory scheme ... unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception.' " (Fair, supra, 40 Cal.4th 189, 194, quoting Foxgate, supra, 26 Cal.4th 1, 15.) Judicial construction, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms.

Thus, in Foxgate, we concluded that under the confidentiality provisions of section 1119, and under section 1121, which strictly limits the content of mediators' reports, "a mediator may not submit to the court, and the court may not consider, a report of communications or conduct by a party which the mediator believes constituted a failure to comply with an order of the mediator [*19] and to participate in good faith in the mediation process. As we noted, the pertinent statutes are clear and unambiguous, thus precluding [125] judicially crafted exceptions. Even if the failure to allow such a report means there is no sanction for a party's refusal to cooperate during a mediation, we observed, "the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the [mediation] process." (Foxgate, supra, 26 Cal.4th 1, 17.)

4 Section 1121 provides: "Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with [s]ection 1118."

Moreover, we pointed out, there was no justification to ignore the plain statutory language, because [*20] a literal interpretation neither undermined clear legislative policy nor produced absurd results. As we explained, the Legislature had
decided that the candor necessary to successful mediation is promoted by shielding mediation participants from the threat that their frank expression of views during a mediation might subject them to sanctions based on the claims of another party, or the mediator, that they were acting in bad faith. (Foxgate, supra, 26 Cal.4th 1, 17.)

In Rojas, we confirmed that under the plain language of the mediation confidentiality statutes, all "writings" "prepared for the purpose of, in the course of, or pursuant to, a mediation," are confidential and protected from discovery. (Rojas, supra, 33 Cal.4th 407, 416, quoting § 1119, subd. (b).) We explained that the broad definition of "writings" set forth in section 250, and incorporated by express reference into section 1119, subdivision (b), encompasses such materials as charts, diagrams, information compilations, expert reports, photographs of physical conditions, recordings or transcriptions of witness statements, and written or recorded analyses of physical evidence. (Rojas, at p. 416.)

We agreed that direct [**21] physical evidence itself is not protected, even if presented in a mediation, because such evidence is not a "writing." (§§ 250, 1119, subd. (b).) We also acknowledged that a "writing" is not protected "solely by reason of its introduction or use in a mediation." (§ 1120, subd. (a).) However, we stressed that any "writing" is so shielded if that "writing" was prepared in connection with a mediation. (Rojas, supra, at p. 417.)

Rojas further made clear that the nondiscoverability of writings prepared for mediation, unlike the shield otherwise provided for certain attorney work product, is not subject to a "good cause" exception, based on "prejudice" or "injustice" to the party seeking discovery. (Code Civ. Proc., former § 2018, subd. (b); see now id., § 2018.030, subd. (b) [attorney work product, other than writings reflecting "attorney's impressions, conclusions, opinions, or legal research or theories" (id., subd. (a)), is discoverable if court finds "that denial of discovery will unfairly prejudice the party seeking discovery ... or [*126] will result in an injustice"].) The mediation confidentiality statutes, we pointed out, include no similar "good cause" limitation, and courts are thus [**22] not free to balance the importance of mediation confidentiality against a party's need for the materials sought. (Rojas, supra, 33 Cal.4th 407, 414, 423-424.)

In Fair, we construed subdivision (b) of section 1123, which permits disclosure of a written settlement agreement reached in mediation if, among other things, "[t]he agreement provides that it is enforceable or binding or words to that effect." (Fair, supra, 40 Cal.4th at p. 196, italics added.) "In order to preserve the confidentiality required to protect the mediation process and provide clear drafting guidelines," we held that, to satisfy section 1123, subdivision (b), the written agreement "must directly express the parties' agreement to be bound by the document they sign." (Fair, supra, 40 Cal.4th 189, 197, italics added.) Thus, the writing must include, on its face, "a statement that it is 'enforceable' or 'binding,' or a declaration in other terms with the same meaning." (Id., at pp. 199-200, italics added.) The mere inclusion of "terms unambiguously signifying the parties' intent to be bound" (id., at p. 197, italics added) will not suffice (id., at p. 200).

We further determined in Fair that a written settlement reached in mediation cannot be made admissible [**23] by virtue of extrinsic evidence of a party's intent to be bound, such as a representation in court by that party's attorney that a final, enforceable agreement was reached in mediation. As we
explained, section 1123, subdivision (b) "is designed to produce documents that clearly reflect the parties' agreement that the settlement terms are 'enforceable or binding.'" (Fair, supra, 40 Cal.4th 189, 198.)

In reaching these conclusions, we noted that a tentative working document produced in mediation may include terms, such as an arbitration provision, "without reflecting an actual agreement to be bound. If such a typical settlement provision were to trigger admissibility, parties might inadvertently give up the protection of mediation confidentiality during their negotiations over the terms of settlement." (Fair, supra, 40 Cal.4th 189, 198.) Durable settlements, we explained, are more likely to result "if [section 1123, subdivision (b)] is applied to require language directly reflecting the parties' awareness that they are executing an 'enforceable or binding' agreement." (Fair, supra, 40 Cal.4th at p. 198.)

Most recently, in Simmons, we held that the judicial doctrines of equitable estoppel and implied waiver are not valid exceptions to the strict technical requirements set forth in the mediation confidentiality statutes for the disclosure and admissibility of oral settlement agreements reached in mediation. (§§ 1118, 1122, subd. (a), 1124.) Thus, we determined, when the plaintiffs sued to enforce an oral mediation agreement the defendant had refused to sign, 5 the plaintiffs could not claim the defendant's pretrial disclosure of the agreement for litigation purposes estopped her from invoking the mediation confidentiality statutes, or constituted a waiver of their requirements. 6

5 Except where confidentiality has been waived (§ 1124, subd. (b); see fn. 6, post), or where disclosure is necessary to show fraud, illegality or duress (§ 1124, subd. (c)), an oral agreement reached in mediation is inadmissible and protected from disclosure (§ 1119, subds. (a), (b)) unless all of the following requirements are satisfied: (1) the oral agreement is transcribed by a court reporter, or recorded by a reliable means of sound recording (§ 1118, subd. (a)), (2) the agreement's terms are recited on the record, in the presence of all parties and the mediator, and the parties state on the record they agree to the terms recited (id., subd. (b)), (3) the parties to the agreement "expressly state on the record that the agreement is enforceable or binding, or words to that effect" (id., subd. (c)), and (4) the transcription or recording is reduced to writing and signed by the parties within 72 hours after it is recorded (id., subd. (d)). (See § 1124.)

6 As noted above, a communication or writing "made or prepared for the purpose of, or in the course of, or pursuant to" a mediation may be disclosed or admitted in evidence if (1) all participants in the mediation expressly so agree in writing, or orally as prescribed in section 1118 (§ 1122, subd. (a)(1)), or (2) the communication or writing was prepared "by or on behalf of fewer than all the mediation participants," those participants expressly so agree in writing, or orally as prescribed in section 1118, and "the communication ... or writing does not disclose anything said or done or any admission made in the course of the mediation" (§ 1122, subd. (a)(2)). An oral agreement made "in the course of, or pursuant to, a mediation" is not inadmissible or protected from disclosure if the agreement satisfies the requirements of
subdivisions (a), (b), and (d) of section 1118 (see fn. 5, ante), "and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement." (§ 1124, subd. (b)).

(4) We affirmed once again in Simmons that the Legislature intended the unambiguous provisions of the mediation confidentiality statutes to be applied broadly (Simmons, supra, 44 Cal.4th 570, 580), that exceptions are limited to narrowly proscribed statutory exemptions, and that "[e]xcept in cases of express waiver or where due process is implicated" (id., at p. 582; see Foxgate, supra, 26 Cal.4th 1, 15-17; Rinaker v. Superior Court (1998) 62 Cal.App.4th 155, 167 [74 Cal. Rptr. 2d 464] (Rinaker) [mediator required to testify where juvenile's due process right to confront witnesses outweighed mediation confidentiality]; Olam v. Congress Mortgage Co. (N.D.Cal. 1999) 68 F. Supp. 2d 1110, 1118-1119, 1129 [parties expressly waived confidentiality]).

7

(5) Here, as in Foxgate, Rojas, Fair, and Simmons, the plain language of the mediation confidentiality statutes controls our result. Section 1119, subdivision (a) clearly provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery ... ." As we noted in Simmons, section 1119, adopted in 1997, "is more expansive than its predecessor, former section 1152.5. Section 1119, subdivision (a), extends to oral communications made for the purpose of or pursuant to a mediation, not just to oral communications made in the course of the mediation. [Citation.]" (Simmons, supra, 44 Cal.4th 570, 581, italics added, citing Cal. Law Revision Com. com., now reprinted at 29B pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1119, p. 391.)

The obvious purpose of the expanded language is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered, if they are made "for the purpose of" or "pursuant to" a mediation. (§ 1119, subds. (a), (b).) It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.
At oral argument, petitioner's counsel stressed that section 1119, subdivision (a) prohibits the discovery or admission in evidence "of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation ... " (Italics added.) Counsel seemed to suggest the italicized phrase "or any admission made" effectively narrows the plain meaning of "anything said" by limiting protection to mediation-related oral communications that are in the nature of damaging admissions. We find no evidence to support this construction. Similar disjunctive language has existed in the statute since the 1985 adoption of section 1119, subdivision (a)'s predecessor, former section 1152.5, subdivision (a) (Stats. 1985, ch. 731, p. 2379), and appeared in the original version of the 1985 bill (see Assem. Bill No. 1030 (1985-1986 Reg. Sess.) as introduced Feb. 27, 1985, p. 1 (Assembly Bill No. 1030)). Portions of the legislative history of Assembly Bill No. 1030 declare that the protective purpose extends, interchangeably, to "disclosures," "information," and "communications." (Recommendation relating to Protection of Mediation Communications, 11 Cal. L. Revision Com. Rep. (1985) pp. 241, 247-248; Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1030 as amended Apr. 8, 1985, pp. 1, 2; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1030, [**30] as amended July 1, 1985, pp. 1-3.) However, petitioner cites no document from this history, and we have found none, that indicates the phrase "or any admission made" was intended, in particular, to limit the plain meaning of "anything said." Nor does the history of the 1997 legislation that was enacted as the current statutes suggest any such significance. On the contrary, as previously noted, the California Law Revision Commission comment to section 1119, subdivision (a) emphasizes that this provision was intended to broaden the protection for mediation-related discussions by extending it beyond utterances "in the course" of a mediation to include "oral communications made for the purpose of or pursuant to a mediation." (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code, supra, foll. § 1119, p. 391, italics added.) In this context, the phrase "anything said or any admission made" seems intended, at most, to indicate that the protection applies not only to damaging admissions conveyed by any means in the context of a mediation, but also, in an abundance of caution, to all other things "said ... for the purpose of, in the course of, or pursuant to, a mediation ... " [**31] (§ 1119, subd. (a), italics added.)

[*129]

This conclusion is reinforced by examination of section 1122, subdivision (a)(2), which sets forth the circumstances under which fewer than all of the participants in a mediation may stipulate to the disclosure of otherwise confidential mediation-related communications. Under this statute, those mediation participants "by or on [whose] behalf" a mediation-related communication, document, or writing was prepared may agree, under specified statutory procedures, to its disclosure, but only insofar as the communication in question "does not [reveal] anything said or done ... in the course of the mediation." (Italics added.) Section 1122, subdivision (a)(2) thus presupposes there are mediation-
related communications that (1) are prepared "by or on behalf of fewer than all the mediation participants," and (2) do not "disclose anything said or done ... in the course of the mediation," but (3) are nonetheless protected by mediation confidentiality unless the affected participants otherwise agree. (Ibid.) Logically, these must include communications that are made or prepared outside a mediation, but are "for the purpose of" or "pursuant to" the mediation. (§ 1119, subds. (a), (b).) Such mediation-related communications plainly encompass those between a mediation disputant and the disputant's counsel, even though these occur away from other mediation participants and reveal nothing about the mediation proceedings themselves.

Agreeing with petitioner's contrary contention, the Court of Appeal majority noted that mediation is defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (§ 1115, subd. (a), italics added.) The majority thus reasoned that the "[l]egislative intent and policy behind mediation confidentiality are to facilitate communication by a party that otherwise the party would not provide, given the potential for another party to the mediation to use the information against the revealing party; they are not to facilitate communication between a party and his own attorney." (Italics added.) Focusing on our statement in Foxgate that the frank exchange essential to a successful mediation "is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes" (Foxgate, [*130] supra, 26 Cal.4th 1, 14, italics added), the majority concluded that a party to mediation, and the party's attorney, are a single mediation "participant" whose communications inter se are not within the intended purview of the mediation confidentiality statutes.

(6) But there is no persuasive basis to equate mediation "parties" or "disputants" with mediation "participants," and thus to restrict confidentiality to potentially damaging mediation-related exchanges between disputing parties. In the first place, section 1119, subdivisions (a) and (b), do not restrict confidentiality to communications between mediation "participants." They provide more broadly that "[n]o evidence of anything said" (§ 1119, subd. (a), italics added), and "[n]o writing" (id., subd. (b)), is discoverable or admissible in a legal proceeding if the utterance or writing was "for the purpose of, in the course of, or pursuant to, a mediation ... ." (Id., subds. (a), (b).) The protection afforded by these statutes is not limited by the identity of the communicator, by his or her status as a "party," "disputant," or "participant" in the mediation itself, by the communication's nature, or by its specific potential for damage to a disputing party.

(7) Second, the Court of Appeal majority's assumption that the mediation "disputants" are the only "participants" in the mediation, and that a disputant and his or her counsel are thus a single "participant," does not bear scrutiny. "Participants" are not defined in the statutory text, but they are mentioned at several points in the statutory scheme, under circumstances making clear that the term "participants" includes more than the mediation parties or disputants.

Thus, section 1119, subdivision (c) provides that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation ... shall remain confidential." The California Law Revision Commission comment following section 1119 states, as
to subdivision (c), that "[a] mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process." (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code, supra, foll. § 1119, p. 391.) The implication is that such an observer is to be considered a "participant" in [**35] the mediation, who is obliged to maintain the confidentiality of communications in the course of a mediation.

An even clearer indication of the correct concept of "participants" arises in connection with section 1122. As noted above, section 1122, subdivision (a) states the conditions under which agreement can be reached for the disclosure and admission in evidence of otherwise confidential materials. Subdivision (a)(1) states that mediation-related communications and writings are not made inadmissible, or protected from disclosure, if "[a]ll persons who conduct or [*131] otherwise participate in the mediation" expressly agree to such disclosure by the prescribed statutory means. Subdivision (a)(2) provides that a communication or writing prepared "by or on behalf of fewer than all the mediation participants" is not protected from disclosure, or made inadmissible, if "those participants" agree to permit disclosure, and the communication or writing "does not disclose anything said or done ... in the course of the mediation."

The California Law Revision Commission comment following section 1122 states, in its analysis of subdivision (a)(1), that "mediation documents and communications may be [**36] admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate)." (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code, supra, foll. § 1122, p. 409, italics added.) The list provided by the commission is, by its terms, not all-inclusive (note the "e.g." preceding the examples given), and no reason appears why other persons attending and assisting in the mediation on behalf of the disputants, such as their counsel, are not themselves distinct "participants" who must agree to the disclosure of confidential mediation-related communications they made or received. 8 Though petitioner urges us to do so, we therefore decline to accept the Court of Appeal's "single participant" characterization, which contradicts the plain import of the statutes. 9

8 As real parties observe, Judicial Council rules governing minimum standards of conduct for civil mediators define a "[p]articipant" in mediation as "any individual, entity, or group, other than the [**37] mediator taking part in a mediation, including but not limited to attorneys for the parties." (Cal. Rules of Court, rule 3.852(3), italics added.) The rules further provide that prior to the first mediation session, the mediator must provide the participants with a general explanation of mediation confidentiality. (Id., rule 3.854(c).) Under the rules, the mediator is further required to give all participants advance warning if he or she intends to speak with one or more participants outside the other participants' presence, and is prohibited from disclosing information revealed in confidence "unless authorized to do so by the participant or participants who revealed the information." (Ibid.) We do not rely directly on the definition
of "participant" in the Judicial Council rules, however, because the definitions therein provided "are applicable only to these rules of conduct and do not limit or expand mediation confidentiality under the Evidence Code or other law." (Advisory Com. com., 23 pt. 1A West's Ann. Codes, Rules (2006 ed.) foll. rule 3.852, p. 424.)

9 Petitioner urges that even if the attorneys who represent a mediation disputant are themselves "participants" in the mediation, they should not be deemed separate "participants" who may thus unilaterally block the discovery and admission in evidence of mediation-related attorney-client communications pertinent to the client's suit against them for legal malpractice. But we see no basis to reach this construction of the statutory language. Section 1122, subdivision (a)(2) clearly requires that when a communication was prepared "by or on behalf of fewer than all ... participants, those participants" must expressly agree to disclosure of the communication. (Italics added.) Any mediation-related communications from WCCP attorneys to petitioner were prepared "by" those "participant" lawyers, who, under the statutory language, must therefore consent by statutory procedures to the disclosure of such communications.

Indeed, other provisions of the statute undermine petitioner's contention that a mediation disputant's participating lawyers are bound, as the disputant's agents, by the disputant's unilateral decision to waive confidentiality. Section 1115, subdivision (b) defines a "mediator" to include not only the neutral person who conducts a mediation, but also "any person designated by [the] mediator either to assist [**39] in the mediation or to communicate with the participants in preparation for [the] mediation." In turn, section 1122, subdivision (b) provides that whenever a mediator expressly agrees to disclosure of an otherwise confidential communication, that agreement also binds the persons described in section 1115, subdivision (b). Insofar as the statutory scheme expressly defines one mediation participant (the mediator) to include his or her assisting agents, and explicitly binds those agents to the mediator's disclosure decision, we may assume the statute does not implicitly extend similar treatment to the relationship between another mediation participant (a disputer) and the disputant's participating counsel.

The Court of Appeal majority also implied that the mediation confidentiality statutes, in their role as protectors of frank exchanges between the parties [*132] to a mediation, were not intended to trump section 958, which eliminates the confidentiality protections otherwise afforded by the attorney-client privilege (§ 950 et seq.) in suits between clients and their own lawyers. But the mediation confidentiality statutes include no exception for legal malpractice actions by mediation disputants [**40] against their own counsel. Moreover, though both statutory schemes involve the shielding of confidential communications, they serve separate and unrelated purposes.

A legal client's personal statutory privilege of confidentiality (§§ 953, 954), applicable to all communications between client and counsel (§ 952), allows the client to consult frankly with counsel on any
matter, without fear that others may later discover and introduce against the client confidences exchanged in the attorney-client relationship. The exception to the privilege set forth in section 958 simply acknowledges that, in litigation between lawyer and client, the client should not be able to use the privilege to bar otherwise relevant and admissible evidence which supports the lawyer's claim, or undermines the client's.

(8) By contrast, the mediation confidentiality statutes do not create a "privilege" in favor of any particular person. (See, e.g., Wimsatt, supra, 152 Cal.App.4th 137, 150, fn. 4; Eisendrath, supra, 109 Cal.App.4th 351, 362-363; but see, e.g., Stewart v. Preston Pipeline Inc. (2005) 134 Cal.App.4th 1565, 1572, fn. 5 [36 Cal. Rptr. 3d 901] [referring to a "mediation privilege"].) Instead, they serve the public policy of encouraging [**41] the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative [*133] means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. To assure this maximum privacy protection, the Legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure.

Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client. 10 The instant Court of Appeal's contrary conclusion is nothing more or less than a judicially crafted exception to the unambiguous [**42] language of the mediation confidentiality statutes in order to accommodate a competing policy concern--here, protection of a client's right to sue his or her attorney. We and the Courts of Appeal have consistently disallowed such exceptions, even where the equities appeared to favor them.

10 Petitioner urges that if mediation confidentiality applies to private conversations between lawyer and client, insofar as they relate to a mediation, the attorneys get the best of both worlds when sued by a client for malpractice in connection with the mediation--i.e., the suit waives the attorney-client privilege, allowing the lawyers to present confidential communications favorable to them, but the mediation confidentiality statutes prevent the client from presenting evidence of such private discussions insofar as they are damaging to the attorneys. Petitioner overlooks that the mediation confidentiality statutes work both ways; they prevent either party to the malpractice suit from disclosing the content of their private mediation-related communications unless (1) the other agrees by the statutory means, and (2) the disclosure reveals nothing said or done in the mediation proceedings themselves. [**43]

Of particular interest in this regard is the Court of Appeal's decision in Wimsatt. There, the court held that mediations briefs and attorney e-mails written and sent in connection with the mediation were
protected from disclosure by the mediation confidentiality statutes, even when one of the mediation disputants sought these materials in support of his legal malpractice action against his own attorneys. Confirming that there is no "attorney malpractice" exception to mediation confidentiality, the Wimsatt court explained: "Our Supreme Court has clearly and [unequivocally] stated that we may not craft exceptions to mediation confidentiality. [Citation.] The Court has also stated that if an exception is to be made for legal misconduct, it is for the Legislature to do, and not the courts. [Citation.]"

A United States District Court case, Benesch v. Green (N.D.Cal., Dec. 17, 2009, No. C-07-03784 EDL) 2009 WL 4885215 [**45] (Benesch), more recent than the Court of Appeal decision in this case, supports our analysis even more closely than does Wimsatt. In Benesch, a mediation disputant sued her attorney, claiming counsel committed malpractice by inducing her, in the mediation, to sign an enforceable "Term Sheet" that failed to meet her aim of ensuring her daughter's inheritance rights. Defendant attorney sought summary judgment, asserting that the client had no case without introducing evidence protected by the mediation confidentiality statutes, including "the legal advice that [counsel] gave to [the client], and the circumstances in which the Term Sheet was executed." (Id., at p. *5.)

The district court denied summary judgment, ruling that it was not absolutely clear the mediation confidentiality statutes left the client without evidence sufficient to prove her case. Nonetheless, the court agreed that the multiple California cases construing the mediation confidentiality statutes, including Wimsatt, "generally support Defendant's position" that mediation-related communications, including those only between client and counsel, are not subject to disclosure, even when this may inhibit a client's claim that [**46] her lawyer committed malpractice. (Benesch, supra, 2009 WL 4885215 at p. *5.)

(10) In particular, Benesch criticized the instant Court of Appeal majority's decision as at odds with section 1119, subdivision (a), contrary to the rule against implied exceptions to mediation confidentiality, and "in significant tension with the large majority of California appellate decisions" construing the mediation confidentiality statutes. (Benesch, supra, 2009 WL 4885215
at p. *7.) As the district court observed, even if a private attorney-client conversation did not occur "in the course of" a mediation, this circumstance is not enough to exempt the communication from confidentiality, because the statutory "protections also encompass communications made 'for the purpose of' or 'pursuant to' mediation ... ."

(Ibid.) The latter phrases, the court explained, "must necessarily include statements that were not made in the course of the mediation itself, or those additional provisions would be superfluous." (Ibid.) [*135]

As pertinent here, the Benesch court declared, "Communications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator, are 'for' [**47] the purpose of' or 'pursuant to' mediation." (Benesch, supra, 2009 WL 4885215 at p. *7.) Indeed, the court noted, if protected communications did not include those outside the mediation proceedings, it would be unnecessary and useless for section 1122, subdivision (a)(2) to provide that communications by and between fewer than all participants in a mediation may be disclosed if all such participants agree and "the communication ... does not disclose anything said or done ... in the course of mediation ... ." (Benesch, supra, at p. *7.)

We agree with this analysis. We further emphasize that application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds. Implicit in our decisions in Foxgate, Rojas, Fair, and Simmons is the premise that the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest.

The Court of Appeal in Wimsatt expressly reached this very conclusion. There, the trial court had found that the mediation briefs and e-mails sought by the legal malpractice plaintiff were [**48] subject to disclosure notwithstanding the mediation confidentiality statutes. The court had relied on Rinaker, supra, 62 Cal.App.4th 155, which held that, under the circumstances of that case, the statutes governing mediation confidentiality were outweighed by the juveniles' constitutional right to obtain evidence crucial to their defense against allegations of criminal conduct.

However, in Wimsatt, the Court of Appeal rejected the analogy to Rinaker, explaining that "in Rinaker the information sought to be introduced was in delinquency proceedings where the minors were being charged with criminal activity. In Rinaker, the information to be elicited (admissions made by the victim) could have exonerated the minors. To deny the minors access to the information would have denied them their constitutionally protected rights. In contrast, the proceedings before us involve a civil legal malpractice action where money damages are sought. The present case is no different from the thousands of civil cases routinely resolved through mediation." (Wimsatt, supra, 152 Cal.App.4th 137, 162.)

Indeed, by their plain terms, section 1119, subdivisions (a) and (b), protect mediation-related communications [**49] from disclosure and admissibility only in "arbitration[s], administrative adjudication[s], civil action[s] [and] other noncriminal proceeding[s] ... ." (Italics added.) Thus, we note, these statutes would afford no protection to an attorney who is criminally prosecuted for fraud on the basis of
Finally, while we pass no judgment on the wisdom of the mediation confidentiality statutes, we cannot say that applying the plain terms of those statutes to the circumstances of this case produces a result that is either absurd or clearly contrary to legislative intent. The Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence. To this end, the Legislature could further reasonably conclude that confidentiality should extend to "anything" said or written "for the purpose of, in the course of, or pursuant to" a mediation (§ 1119, subds. (a), (b)), including mediation-related discussions between a mediation disputant and his own counsel, [*50] subject only to express waiver by all mediation "participants" involved in the communication (§ 1122), including such attorneys.

Inclusion of private attorney-client discussions in the mediation confidentiality scheme addresses several issues about which the Legislature could rationally be concerned. At the outset, the Legislature might determine, such an inclusion gives maximum assurance that disclosure of an ancillary mediation-related communication will not, perhaps inadvertently, breach the confidentiality of the mediation proceedings themselves, to the damage of one of the mediation disputants.

Moreover, as real parties observe, the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would [*51] not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

We express no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province. We simply conclude, as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys. [*137]

Finally, petitioner urges that application of the mediation confidentiality statutes to private attorney-client communications creates a difficult line-drawing problem because, when such discussions occur near the time of a mediation proceeding but [*52] in a broader litigation context, it may be "almost impossible" to determine whether the discussions were "exclusively" mediation related. But petitioner's suggested alternative--that no private attorney-client communications, however closely related to
a mediation, are covered by mediation confidentiality--ignores the plain language of the statutes. By their terms, "[n/o evidence of anything said," and "[n/o writing ... prepared" is subject to discovery or admission in evidence in any "civil action" if the utterance or writing was "for the purpose of, in the course of, or pursuant to, a mediation ... ." (§ 1119, subds. (a), (b), italics added.) The exclusion of all private attorney-client communications from that proviso would simply engrai an exception that does not appear in the mediation confidentiality statutes themselves.

Moreover, we need not decide in this case the precise parameters of the phrase "for the purpose of, in the course of, or pursuant to, a mediation." The communications the trial court excluded from discovery and evidence concerned the settlement strategy to be pursued at an immediately pending mediation. They were closely related to the mediation in time, [**53] context, and subject matter, and a number of them occurred during, and in direct pursuit of, the mediation proceeding itself. Petitioner raises no factual dispute about the relationship between the excluded communications, or any of them, and the mediation in which he was involved. There appears no basis to dispute that they were "for the purpose of, in the course of, or pursuant to, a mediation ... ." (§ 1119, subd. (a).) 12

12 Petitioner suggests private attorney-client communications cannot be covered by the mediation confidentiality statutes, because they are not part of the "mediation process." In support of this contention, petitioner cites Saeta v. Superior Court (2004) 117 Cal.App.4th 261 [11 Cal. Rptr. 3d 610] for the proposition that the concept of "mediation" has limits. Saeta held that the mediation confidentiality statutes did not apply to the proceedings of a "termination review board" before which a discharged employee had a contractual entitlement to review of the termination decision. The board was composed of an employer representative, an employee representative, and a "neutral" third member, and was empowered to take evidence, then report to the employer's home office its view whether [**54] the termination should be upheld. (Id. at p. 265.) Applying the premise that "[statutory] privileges are narrowly construed ... because they operate to prevent the admission of relevant evidence ... " (id., at p. 272), the Saeta court observed that the board there at issue, which included party representatives, and whose function was to review and recommend, lacked two minimum elements of the "broad" definition of mediation--"a neutral mediator or group of mediators" and an "aim to facilitate a mutually acceptable result" by the parties' voluntary agreement (id., at p. 271). Nothing in Saeta is inconsistent with what we conclude here. No party disputes that the proceeding of August 4, 2004, was a mediation, within the meaning of section 1115, to attempt to settle the VDO suit. The only question presented is whether certain attorney-client communications were "for the purpose of, in the course of, or pursuant to," that mediation. (§ 1119, subd. (a).)

[*138]

(11) We therefore conclude that the evidence the trial court ruled nondiscoverable and inadmissible by reason of the mediation confidentiality statutes was not, as a matter of law, excluded from
coverage by those statutes on the mere
ground that [**55] they were private
attorney-client communications which
occurred outside the presence or hearing of
the mediator or any other mediation
participant. Instead, such attorney-client
communications, like any other
communications, were confidential, and
therefore were neither discoverable nor
admissible--even for purposes of proving a
claim of legal malpractice--insofar as they
were "for the purpose of, in the course of, or
pursuant to, a mediation ... ." (§ 1119, subd.
(a).) By holding otherwise, and thus
overturning the trial court's exclusionary
order, the Court of Appeal erred. We must
therefore reverse the Court of Appeal's
judgment.

CONCLUSION

The Court of Appeal's judgment is
reversed.

Kennard, Acting C. J., Werdegar, J.,
Moreno, J., Corrigan, J., and George, J.;
concurred.

* Retired Chief Justice of California,
assigned by the Chief Justice pursuant
to article VI, section 6 of the
California Constitution.

CONCUR BY: Chin

CONCUR

CHIN, J., Concurring.--I concur in the
result, but reluctantly.

The court holds today that private
communications between an attorney and a
client related to mediation remain
confidential even in a lawsuit between the
two. This holding will effectively shield an
attorney's actions during mediation,
including advising the client, from a
malpractice action even if those actions are
incompetent or even deceptive. ¹ Attorneys

[**56] participating in mediation will not be
held accountable for any incompetent or
fraudulent actions during that mediation
unless the actions are so extreme as to
engender a criminal prosecution against the
attorney. (See maj. opn., ante, at p. 135, fn.
11.) This is a high price to pay to preserve
total confidentiality in the mediation
process.

¹ I emphasize that I am not
suggesting there was any malpractice
or deception in this case. The merits
of the underlying lawsuit are not
before us and, after today's ruling,
might never come before any court. I
am speaking in general.

I greatly sympathize with the Court of
Appeal majority's attempt to interpret the
statutory language as not mandating
confidentiality in this [*139] situation. But,
for the reasons the present majority gives, I
do not believe the attempt quite succeeds.

Moreover, although we may sometimes
depart from literal statutory language if a
literal interpretation "would result in absurd
consequences that the Legislature did not
intend" (In re Michele D. (2002) 29 Cal.4th
600, 606 [128 Cal. Rptr. 2d 92, 59 P.3d
164]), I believe, just barely, that the result
here does not so qualify. Plausible policies
support a literal interpretation. Unlike the
attorney-client privilege [**57] --which the
client alone holds and may waive (Evid.
Code, §§ 953, 954)--mediation
confidentiality implicates interests beyond
those of the client. Other participants in the
mediation also have an interest in
confidentiality. This interest may extend to
private communications between the
attorney and the client because those
communications themselves will often
disclose what others have said during the
mediation. Additionally, as the majority
notes, it might "not be fair to allow a client
to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.” (Maj. opn., ante, at p. 136.)

Accordingly, I agree with the majority that we have to give effect to the literal statutory language. But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney’s statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. But this court cannot so hold in the guise of interpreting statutes that contain no such provision. As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so.

This case does not present the question of what happens if every participant in the mediation except the attorney waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature’s purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point.
Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)

Introduction

More than ever, employers and employees are turning to mediation and other forms of Alternative Dispute Resolution (ADR) to resolve equal employment opportunity (EEO) disputes. While the proliferation of public and private sector ADR programs has been a boon for employers and employees alike, many mediators have sought guidance on how to ensure that the mediation process is accessible to participants with disabilities. Mediators also have raised questions about special considerations that may arise when mediating employment cases alleging discrimination under the Americans
There are two basic ways that disability issues may arise in mediation concerning EEO disputes. First, the dispute itself may raise a claim under Titles I or II of the ADA or Section 501 of the Rehabilitation Act, such as allegations of disparate treatment based on disability, denial of reasonable accommodation, improper disability-related inquiries and medical examinations, or breach of medical confidentiality. Second, in some cases presented for mediation - whether or not the case arises under the ADA or Rehabilitation Act - parties or their representatives may request a reasonable accommodation for the mediation process itself.

This technical assistance document addresses frequently asked questions regarding the ADA and mediation. It is intended for any mediation provider handling EEO disputes, whether affiliated with an employer-provided, organizational, or solo practice mediation service in either the public or private sector. The topics addressed include how to provide access to mediation for participants with disabilities, what types of accommodation may be required, how to handle associated costs, and suggested ADA training of mediators.

**General Considerations**

1. What legal obligations do mediation providers have to participants in the mediation process who are individuals with disabilities?

Titles I and II of the ADA and Section 501 of the Rehabilitation Act collectively prohibit private employers with fifteen or more employees and federal, state, and local government employers of any size from discriminating against qualified individuals with disabilities with respect to all terms, conditions, and privileges of employment. These laws also require covered employers to make "reasonable accommodations" that enable qualified individuals with disabilities to enjoy equal employment opportunities. Consequently, when an employer provides mediation of EEO disputes as a benefit or privilege of employment, it must make reasonable accommodations needed for the mediation, absent undue hardship (i.e., significant difficulty or expense in light of the employer's resources and business operations).

An outside mediator has a similar obligation under Title II (covering state and local governments) or Title III of the ADA (covering public
accommodations), or under Section 504 of the Rehabilitation Act (covering government programs and activities) to provide auxiliary aids, effective communication, and accessible services unless an undue burden or fundamental alteration of the nature of the mediation program would result.\(^{(3)}\)

**Example:** A private practice solo mediator is offering mediation services on a case in which one of the parties has requested a sign language interpreter due to a hearing impairment. The mediator contacts an interpreter service, and learns that hiring an interpreter will cost $80/hour. The mediation is expected to last 6 hours. The total cost of $480 to provide the interpreter is unlikely to be deemed a "significant difficulty or expense" under the ADA, because the overall financial resources of the mediation provider are considered, not just the fee for that single mediation.

**Practice Tip:** Mediation providers should anticipate that accommodations or auxiliary aids and services will be periodically requested, and should take this into account in annual budget planning.

2. Apart from any legal obligations, are there any ethical codes or practice standards that address accessibility of the mediation process?

Yes. The *Model Standards of Conduct for Mediators* (1994), http://www.abanet.org/ftp/pub/dispute/modstan.txt, state that among the obligations of mediators to improve the practice of mediation is the duty "to make mediation accessible to those who would like to use it." (Comment to Model Standard IX). In addition, several voluntary practice standards have been issued by mediation organizations which specifically address disability accessibility, including the *ADA Mediation Guidelines* (2000), available at http://www.cojcr.org, issued by a national work group comprised of representatives from a variety of organizations, and the *Practice Standards for ADA Mediators* (1999), available at http://www.keybridge.org/med_info/ada/ada_mediator_standards.htm, issued by the Center for Mediation, Key Bridge Foundation, Washington, D.C. These sources suggest that mediators can consider voluntary best practices such as:

- using "the broadest definition of disability" when deciding whether to provide an accommodation;\(^{(4)}\)
• encouraging parties to use the ADA/Rehabilitation Act legal and community resources available to become familiar with their rights and responsibilities, so that they can fully consider their interests and options;

• where a question arises about a party's capacity to participate in mediation, assessing the party's abilities and determining appropriate accommodations through dialogue with the party, rather than making assumptions about a party's abilities based on her medical condition or diagnosis;

• advising parties of their right to independent legal or other representation;

• ensuring that the mediator has sufficient information about the case and accessibility needs to plan the mediation and manage it effectively;

• clearly defining the role of representatives (e.g., disability rights advocate, expert, vocational rehabilitation counselor, family member, attorney, union representative, or other person), neutral experts and resource persons, personal assistants, interpreters, and other non-party participants in the mediation;

• ensuring mediator training and post-training mediation support, on substantive law and procedural issues, disability awareness, and the practical application of mediation to ADA disputes;

• ensuring mediator competency, i.e., knowledge of disabilities, disability access, and disability law, including general ADA case law developments and guidance issued by regulatory agencies; and,

• maintaining confidentiality of disability-related information in arranging access and when conducting the mediation.

3. What does it mean for the mediation process to be accessible for people with disabilities?

Making the mediation accessible for individuals with disabilities may mean providing auxiliary aids or services, adapting procedures, modifying policies, changing locations, or other methods of removing barriers to full and informed participation in the process. As a best practice, mediators should help all parties identify what they need to participate effectively in the mediation and reasonably adapt the process to their needs.
A mediator should consider whether the parties can:

- physically access the mediation facility;
- obtain and use necessary information related to the mediation process;
- understand the purpose and goals of the mediation;
- understand the role of each person present (including advocates, support persons, resource persons or neutral experts, interpreters, etc.);
- understand the steps in the mediation process and the "ground rules"; and,
- participate as fully as possible according to each party's abilities in all phases of the mediation process, including preliminary phases.

A detailed chart setting forth common disability-related accommodation requests and solutions relating to the mediation process is attached at Appendix A.

**Accommodating Mediation Participants with Disabilities**

The following questions and answers address situations in which reasonable accommodations may be necessary to make the mediation process accessible to individuals with disabilities. While the legal obligation of a mediation provider (or an employer that offers mediation as a benefit or privilege of employment) extends only to those who meet the ADA and Rehabilitation Act's definition of an "individual with a disability," mediation providers are free to take measures, in accordance with their understanding of ethical obligations or their adoption of best practices, that lead to a greater level of accessibility than the law requires.

**4. Does a mediator need to change the way a mediation is ordinarily handled to accommodate someone with a disability?**

In some instances, yes. In addition to ensuring that the mediation site is physically accessible, a mediator may need to modify some typical mediation procedures to ensure that the mediation process is accessible. This does not mean compromising the impartiality and effectiveness of the mediator.
Example: To accommodate a party with a traumatic brain injury who is unable to follow the process for sustained periods of time, a mediator may need to allow more frequent breaks than are usually taken.

Example: An individual with a cognitive disability tells the mediator that she is having difficulty following discussions and understanding various settlement alternatives available to her. She asks the mediator to advise her what settlement option he thinks is best and to do whatever he can to help convince the employer to agree to it. This is not a reasonable accommodation, because it would require the mediator to act as an advisor to, or advocate for, one of the parties, rather than as a neutral third party, and would thus fundamentally alter the nature of the mediation process. (Of course, the mediator may advise the individual regarding her right to bring a representative, such as an attorney or family member, to serve as an advocate during the mediation.)

5. How should the mediator find out if any of the participants need accommodation because of a disability?

When a mediation program has an intake or screening process before the case is referred to a mediator, the intake process should include:

- asking whether any accommodations may be needed;
- making arrangements for the accommodations requested; and,
- advising the mediator of any accommodation arrangements that have been made and any accommodation needs that the mediator will need to address.

Referral sources and intake personnel should ensure that mediation providers are advised in advance when their cases involve parties with disabilities who need accommodation, and when any accessibility arrangements have already been made or any process changes or other accommodations have been requested. Mediators should also consult directly with the parties and their representatives before the first session to help identify any accessibility needs. This consultation can be conducted in person, by telephone, or by e-mail.

A sample intake form is attached as Appendix B.
Practice Tip: Through either a standardized intake form or standardized verbal inquiry, always ask all parties during the intake procedure and/or during the convening phase what, if anything, they will need to facilitate participation in the mediation.

Practice Tip: If intake is done by someone other than the mediator, establish a standardized procedure for fully communicating to the mediator before the mediation begins any accommodation requests made during intake, arrangements which have been made following intake in response to the requests, and any accommodation issues that may remain for the mediator to address.

6. Should mediators ask all mediation participants if they need accommodations?

Yes. As a best practice, mediators should explain the mediation process to all the parties and ask if there is anything they might need to help them participate effectively. The inquiry should not be limited to parties whose potential need for accommodation is immediately apparent, since many disabilities are not obvious. This is consistent with the standard practice of most mediators, of describing the process and asking all parties if there are any modifications they will need, whether for disability-related or other reasons. The mediator also should be aware that a party might not be able to anticipate all necessary accommodations until the party is involved in the mediation process. If a barrier does not become apparent or a request has not been made until after the mediation has begun, accommodations can be considered and provided at that time.

7. Does a mediation participant have to ask for an accommodation for a disability in order to trigger any legal obligation to provide it?

In general, mediation providers should be proactive regarding accessibility, for example holding mediations in physically accessible locations and ensuring that mediation staff understand basic ADA accessibility provisions such as the right to enter with a service animal. However, individuals will need to request accommodation in cases where the mediation provider will not otherwise know that any policy modifications or services requiring advance arrangements are needed (e.g., sign language interpreter, materials in alternative format, special break schedule during mediation...
sessions, or other arrangements that might require advance planning or modifying usual procedures).

Sometimes a mediation participant will not request accommodation until the mediation has started. In those instances, the mediation provider should nevertheless address the request, and proceed to determine whether and what accommodation can be provided.

**8. Does a mediation participant's request for accommodation for a disability have to take any particular form?**

No. An individual seeking accommodation should advise the mediation provider what accommodation is needed and why. The request can be oral rather than written, and need not contain any magic words, such as "ADA" or "reasonable accommodation," but it must be sufficient to give notice of the need for a change or adjustment due to a physical or mental condition.

**9. What should mediation providers do when a mediation participant identifies a possible need for accommodation for a disability?**

The intake person or mediator should work with the individual and, where appropriate, with the party's representative, to determine the appropriate accommodation. Mediators can avoid unnecessary inquiry about an individual's disability by simply describing the process and asking what accommodations might be needed.

*Practice Tip: Ask what the parties will need rather than making assumptions.* Be candid, open, and specific with the parties about what information you need to provide accommodation. For example, it is okay to say "I don't have any previous experience mediating with someone who is blind [deaf, uses a wheelchair, etc.], so I will need your help to assist you with this process as effectively as possible."

The mediation provider and the requesting individual should engage in an informal process to clarify what the individual needs. If the request is received at the intake stage, the person doing the intake should begin the accommodation process where feasible, in consultation with the mediator. If it is not feasible to begin making accommodation arrangements at the intake stage, the person doing the intake should refer the accommodation request to the mediation provider.
Practice Tip: Sometimes the party requesting accommodation will have particular solutions in mind. In other instances the party will only know the problem, and the mediator should explore possible solutions. Help the parties identify the accommodations they need by first listening to them, then exploring options for accommodations.

Practice Tip: Decide together with the party what accommodation is appropriate and how it will be implemented. Once the appropriate accommodation has been identified, the mediator can ask the party for referrals to any preferred provider of any auxiliary services, e.g., sign language interpreters, Braille service, computer-assisted real-time translation (CART), etc. Mediators can also contact their state or local Independent Living organizations for such referral or use their own list of local resources for possible referrals in addition to asking the party for referrals.

A list of potential accommodation resources is included at Appendix C.

10. Is the mediator required to provide the specific accommodation that an individual with a disability requests?

No. Except where a specific accessibility standard is required by law, the mediation provider may choose among reasonable accommodations as long as the chosen accommodation is effective to remove the barrier to the mediation. If a requested accommodation would pose significant difficulty or expense, or would fundamentally alter the mediation, the mediator must determine if there is an alternative reasonable accommodation that does not pose these problems and offer the accommodation if one exists.

Example: A party with a learning disability asks to tape record the mediation session, explaining to the mediator that this will accommodate his inability to take comprehensive notes. The mediator is concerned that allowing a tape recording of the mediation session will inhibit the other participants and may raise confidentiality concerns, and instead offers a qualified note taker for the session. Assuming the notes are satisfactory, this may be an equally effective accommodation.
Example: If a mediator's office is in an upstairs floor in a building with no elevator, and thus providing physical access to the office would be too difficult or costly, the mediator could hold meetings with a person using a wheelchair on the first floor of the building or in an alternative accessible location.

Practice Tip: Bear in mind that solutions to accessibility problems are highly individualized, and therefore any given situation may require a different solution than you have employed in the past, even for someone with the same disability.

11. May an individual with a disability be entitled to more than one accommodation?

Yes. Some parties may have multiple disabilities and related needs, or a single disability might affect the person in multiple ways. For example, a person who is blind and also has emphysema may require an accommodation for his restricted vision and another accommodation for his inability to walk long distances or climb stairs.

12. What if more than one participant needs an accommodation, and their requests are in conflict?

Requests for accommodations sometimes may be in conflict. For example, one party may need frequent breaks to recap and review what is happening, and the other party may need to limit the time spent in mediation because of a physical inability to sit for long periods. The mediator may suggest a process modification such as an initial joint session to identify interests and desired outcomes, and then adjourn the session and conduct the rest of the mediation in subsequent sessions or "shuttle diplomacy style" by phone if both parties agree.

13. Does a mediation provider have to provide reasonable accommodation for a non-party participant in the mediation (e.g., a party's representative)?

Title III of the ADA prohibits discrimination against people with disabilities who seek to enjoy the goods, services, facilities, privileges, advantages, or accommodations offered by places of public accommodation. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability against participants in programs or activities that receive federal financial assistance or that are conducted by the federal government. Title II of the
ADA essentially applies the same standards as Section 504 to State and local government entities, regardless of whether they receive federal funds.

Consequently, the following entities must provide accommodations for non-party participants in a mediation:

- Private mediation providers, whether or not they are retained by an employer;
- Private employers that receive federal financial assistance and that provide mediation of disputes to their employees as a benefit or privilege of employment;
- Federal agencies, whether providing mediation for their own employees or for members of the public; and,
- State or local government entities, whether providing mediation for their own employees or for members of the public (regardless of whether or not the entity receives federal financial assistance).

The obligation of a private employer covered only by Title I to accommodate a non-party participant in the mediation of an employee's EEO dispute is less clear. In these circumstances, however, providing an accommodation may help to ensure the fairness of the process and facilitate resolution of the dispute.

**Example:** A private employer that receives no federal financial assistance (and, therefore, is not subject to Section 504 of the Rehabilitation Act) establishes an in-house mediation program to resolve EEO disputes and allows employees participating in the program to bring someone with them to the mediation. An employee wants to use the mediation program and wants to bring a representative with him. The representative is blind and uses a service animal. Allowing the employee's representative to attend the mediation with the service animal would ensure that the employee can have a representative of his choice at the mediation.

**14. Who pays for the cost of any accommodations if more than one entity provides a mediation?**

Where two or more entities each have an independent legal obligation to provide and pay for an accommodation for a mediation participant, they are both responsible. Therefore, they should communicate and coordinate in advance to plan who will arrange for the accommodation and how the cost...
will be handled. In some cases of joint obligation, one entity will offer to cover the entire cost; in other cases, a cost-sharing arrangement may be devised.

15. May providers of mediation services charge an individual with a disability for the cost of reasonable accommodations, such as sign language interpreters?

No. If an accommodation needed by an individual with a disability does not pose significant difficulty or expense, the mediation provider has to provide and pay for it.

Practice Tip: Develop a standardized method for handling any costs associated with providing accommodations for mediation, such as a central fund for this purpose. Also, if you are a private entity, consult with your tax preparer regarding tax deductions and credits available for providing reasonable accommodation.

16. Should a mediation provider decline a case if it concludes it can’t afford to pay for a requested accommodation?

Before you decide that providing an accommodation poses a significant difficulty or expense, consider some of these alternatives:

- consult with the Job Accommodation Network (JAN), 1-800-526-7234 (V/TDD, http://www.jan.wvu.edu, or your regional Disability Business Technical Assistance Center (DBTAC), 1-800-949-4232 (V/TDD), http://www.adata.org, regarding possible no-cost or low-cost options available in your area.

- anticipate the occasional accommodations which will inevitably need to be provided to some mediation participants, and annually budget a line item for this expense, or build the expected costs into your overhead and fee structure. Be sure, however, that you do not bill a party for the cost of providing accommodations.

- consider asking your local professional association to create an accommodations resource center or common fund for accommodation costs incurred by solo mediators.
Mediation Readiness

17. How should a mediator consider a party's disability in assessing the party's capacity to participate in mediation?

Bear in mind that regardless of whether or not a mediation participant has a disability, people's capacity to participate effectively in mediation varies widely based on their knowledge, education, training, personalities, and a host of other factors. Moreover, even for parties with disabilities, the impact of their disabling conditions on their functional abilities can vary from day to day. Therefore, rather than focusing on the disability, it is most useful for mediators to focus on communicating with all parties about their needs throughout the process, and on being prepared to modify the process as needed to enhance the parties' participation.

18. What if a mediator is concerned that an individual cannot participate competently in a mediation because of a physical or mental disability?

A best practice is for the mediator to consult with the party before the mediation begins to determine what he may need to participate in the mediation. During the convening phase before the first mediation session, the mediator can discuss with the parties what might enhance each party's ability to participate (e.g., later starting time, presence of a representative or support person, etc.) The mediator's discussions with the parties during the convening phase also provide an opportunity for the parties to vent frustrations and clarify desired outcomes prior to the mediation session. It is also a good opportunity for the mediator to give a party feedback about any difficulties the mediator is having understanding the party. The mediator can be candid about her own need for assistance to understand the party's needs and interests.

Practice Tip: Avoid making assumptions about whether a party is unable to participate in mediation due to an emotional or cognitive limitation. By taking the time to understand the party's perspective and abilities, the mediator may be able to work with the party to reach an agreement that the party will be able to carry out.
Practice Tip: When a party is not able to articulate what he wants from the process or doesn't seem to understand the process, a third party support person whom the party respects and trusts can be very helpful. The support person can serve as an ally and coach to the party, helping the party follow what is happening, evaluate options, and decide what is in the party's best interest. This person might be a trusted family member, friend, co-worker, or attorney.

In addition, frequent private caucuses give the mediator the opportunity to check in with the parties and assess whether something else is needed. The mediator should attempt to provide an appropriate accommodation whenever possible. If the mediator determines, however, that she can no longer effectively facilitate the party's participation, the mediator should inform the parties that she cannot conduct the mediation and should withdraw from the case.

Establishing Effective Procedures

19. What should a mediation provider include in its policies and procedures to help ensure that mediation services are accessible?

- A standardized procedure and clear program guidelines for:
  - relaying any accommodation request information obtained by the intake personnel or referral source;
  - inquiring about accessibility needs at the convening phase;
  - processing accommodation requests;
  - locating resources to assist the mediator in resolving an accommodation issue; and,
  - providing and funding accommodations (explain who is responsible for processing accommodation requests in your organization, and outline the steps to take and resources to consult if an accommodation request is received).

- A method for tracking information regarding accommodations provided for mediation, so that you can analyze whether there are any problems
and implement appropriate changes to your accommodation policy and procedures.

- A way of clearly communicating your accessibility procedures and program guidelines to any contract mediators or employees, as well as training on the guidelines.

- A process for ensuring that mediated agreements comply with non-discrimination laws.

In the case of employer-provided mediation programs, consider whether the mediation program should be under the auspices of an independent office which does not run the risk of perceptions of partiality or bias in favor of management. Some employers have concluded that their in-house legal department, human resources department, or equal employment opportunity/civil rights department are not appropriate offices in which to house the mediation program for this reason.

**Special Considerations for Mediators**

**20. What basic things should a mediator keep in mind for a case that involves a disability law issue, or where a mediation participant has a disability?**

- Familiarize yourself with the up-to-date ADA or Rehabilitation Act requirements that apply to the case, relevant current case law developments, and available government and community resources to help meet the accessibility and other accommodation needs of the parties. A *checklist of legal issues frequently arising in an EEO case raising a denial of reasonable accommodation is attached at Appendix D*. A list of selected reference materials addressing ADA and mediation is attached at Appendix E.

- If a party asks for an accommodation you don't know how to provide or about which you need more information, you should initiate a discussion with the party as part of the interactive process. In other words, don't pretend to know more than you do, and establish open two-way lines of communication with the parties about any disability-related needs.

- Manage your parties' expectations. In order to avoid a party misperceiving as advocacy your efforts to adapt the process to disability needs, maintain a clear and distinct boundary between
process changes intended to ensure accessibility versus the merits of the claims under mediation.

21. What might a mediation provider do to explain the presence of an interpreter, reader, or other non-party participant at the mediation?

The mediator may fully explain to all those present at the mediation what the role of an interpreter, reader, or other non-party participant will be, where he is present to assist an individual with disability-related needs. However, the mediator should in all cases require all mediation participants, both parties and non-parties, to sign a confidentiality agreement not to discuss what occurs during the mediation with anyone outside the process.

22. What confidentiality obligations apply when a party discloses information about a disability to the mediation provider?

Based on standard mediation practices, the mediator should treat medical information about the participants confidentially, including the fact that a participant has requested a reasonable accommodation for the mediation, the fact that a participant has a disability, and the extent of a known disability.\(^{(6)}\) The mediator can address disability-related needs without identifying them as such. For example, if a party has requested a break to take medication at a certain time, the mediator can call a "stretch" break for all participants. Under the rules governing most mediation programs, all participants to a mediation, including the parties, their respective representatives, and the mediator, must keep all mediation communications confidential.\(^{(7)}\) The mediation provider will typically require that everyone in the mediation sign a confidentiality agreement, and also will direct the participants that after the mediation, they should destroy any notes they took during the mediation.

23. How can mediators ensure the integrity of mediation agreements reached in ADA/Rehabilitation Act cases?

Mediation providers should advise the parties to a mediation following execution of a mediated agreement that they may contact the mediation provider if either party fails to comply with responsibilities under the agreement. Some employer mediation programs allow a party a specified period of time to initiate a complaint process regarding any alleged breach of a settlement agreement. Mediation providers can also establish a procedure for formally following up with the parties at a date specified in the mediated
agreement, to help ensure the durability of the agreement and to provide the parties with an opportunity to seek the mediator's assistance if the agreement has not been implemented.

**Mediator Training and Skills Development**

Although the ADA and the Rehabilitation Act do not specifically require any type of training for mediators regarding disability law, training is the best way for mediators to ensure compliance with their legal and ethical obligations. Novice and experienced mediators alike have found ADA-specific mediation training extremely helpful in preparing them to be sensitive and responsive to the accessibility needs of mediation participants. The following questions address frequently-raised concerns regarding ADA training for mediators.

24. **Is training in mediating disability-related cases a standard part of all mediation training?**

Typically not. However, training in the basics of disability law, disability awareness generally, and the legal and ethical obligations to make the mediation process accessible is a best practice for developing the knowledge and skills necessary to mediate both disability-related cases and other types of cases as well.

- **Practice Tip:** Mediation program directors can use questionnaires to inventory their roster mediators' professional training, experience, and interests, to develop and maintain a skills matrix that facilitates matching mediators' skills to particular disability cases.

- **Practice Tip:** Mediation program directors can develop a process for supervising and supporting their mediators who are new to ADA/Rehabilitation Act cases, and for providing them with constructive feedback/evaluation.

25. **Do mediators need any special training to mediate cases involving persons with disabilities?**
There are different views among mediators about this issue. However, many experienced ADA mediation providers generally recommend training addressing these topics:

- ADA requirements for accessibility and reasonable accommodation;
- How to apply ethical standards and modify mediation procedures to meet the needs of the parties (ways to level the playing field between the parties, how to interact with parties about their needs for changes in the mediation process, and recommended practices to enhance each party's participation throughout the mediation);
- How to facilitate mediation by adapting the process to accommodate the individual limitations and abilities of the parties; and,
- How to access government and community resources that can help accommodate the needs of parties with various kinds of disabilities.

26. What types of basic ADA/Rehabilitation Act training are generally useful to all mediation providers, regardless of the types of cases they handle?

Mediators working with all types of cases can benefit from training that includes an overview of accessibility requirements under ADA/Rehabilitation Act and mediator ethics, as well as disability awareness exercises (etiquette, communications, bias, accessibility, resources, practical application, interaction with people with different disabilities on common dispute issues, mediation access, and process adaptations). This will help mediators respond to accessibility needs of mediation participants.

Practice Tip: Equip all mediators with educational materials about the ADA and a list of informational resources. Some of these same materials could be made available to the parties before the first mediation session when the case being mediated involves an ADA dispute.

27. What could be included in specialized training for mediators who are handling ADA/Rehabilitation Act cases?

- Mock mediation (by trainers or experienced mediators) that demonstrates how information-gathering should occur in the convening phase and during mediation, followed by debriefing (feedback to mediator and discussion of issues).
• Legal updates and case studies presented by a legal expert, including coverage of statutes, regulations, and interpretive guidance from federal enforcement agencies.

• Role playing for mediation trainees on how to engage in the interactive process with a party who has a disability to determine necessary process modifications, or on assessing a party's capacity to participate in mediation.

• Helpful strategies for facilitating effective participation for parties with mental disabilities.

• Roundtable discussion in which people with disabilities share their perspectives/experiences with mediation.

• Training on alternative settlement options where return to work is not feasible (e.g., financial remedies, social security disability income, vocational rehabilitation, etc.).

28. After initial training, how can mediators continue improving their skills for mediation of disability-related disputes?

• Participate in supervised clinical hours that involve being observed and critiqued by experienced mediators in performing a mediation from intake through final agreement.

• Remain current with EEOC and DOJ policy guidance and technical assistance documents posted on http://www.eeoc.gov and http://www.ada.gov, as well as literature posted on other disability-related websites.

• Engage in peer exchanges with fellow mediators experienced in mediating disability cases, including mediators with disabilities.

• Make contacts with local disability organizations and participate in their activities.

29. What steps can a mediation organization or employer with a roster of mediators take to provide helpful skills development and continuing education?

• Designate a qualified internal person or office to serve as an expert resource for your mediators on accessibility and accommodation issues that arise in their mediations. Publicize this resource to your mediators and mediation participants to help identify options for resolving access
problems and to assist if problems arise in implementing an agreement.

- Develop a centralized mechanism for funding accommodations, and if you have a funding source (e.g., some federal government agencies contract with the Department of Defense Computer/Electronic Accommodations Program (CAP)), publicize to your mediators the existence of this resource and the procedure for accessing it.

- Provide a range of continuing education opportunities for beginning, intermediate and advanced level mediators, and provide training by experts in disability mediation for roster mediators who lack experience.

- Provide regularly updated educational materials for mediators on disability law developments.

- Provide a mentoring/apprenticeship program to partner less experienced mediators on your roster with more experienced ADA mediators for informal guidance.

30. How can a mediation provider obtain neutral experts or other objective information about disabilities and workplace accommodations to share with the parties at little or no cost?

- Contact your regional Disability and Business Technical Assistance Center (DBTAC); the U.S. Department of Labor’s Job Accommodation Network (JAN); federal, state, or local public agencies (e.g., vocational rehabilitation); and non-profit organizations with technical expertise related to the accommodation issues in the dispute.

- Consult public agency websites (e.g., http://www.eeoc.gov and http://www.ada.gov) for objective information regarding rights and responsibilities related to disability accessibility.

- Consult disability organizations (e.g., the Epilepsy Foundation, American Lung Association, United Cerebral Palsy, etc.) for relevant information on the accessibility issues presented in a particular case.

- Request generic medical information from a health care provider about the nature of a particular physical or mental impairment.
31. Do mediation programs have to make their training accessible to people with disabilities?

Private or government employer-sponsored mediation programs that train employees as mediators must, absent significant difficulty or expense, accommodate otherwise qualified employees who are individuals with disabilities and seek to participate in the mediation training. Similarly, non-employer-sponsored mediation services that train members of the public as mediators or that provide training for current mediators must provide accommodation for otherwise qualified mediators with disabilities who seek to participate in the training absent significant difficulty or expense or a fundamental alteration of the program.

32. I am a person with a disability and I am interested in becoming a mediator. What should I do to ensure that the training is accessible?

Prior to the training, you should contact the training provider to ask what will take place and to advise the provider of your accessibility needs. Discuss accessibility options with the provider, and negotiate to identify the options that will make the training accessible to you without posing significant difficulty or expense for the provider. If you need the provider to obtain certain auxiliary aids or services, offer any suggestions or contact information you may have that could assist the provider in making these arrangements.

Appendix A - Commonly Requested Accommodations Relating to Mediation

The following are examples of some types of requests for disability accommodation relating to mediation, the possible barriers that might trigger the need for a person to make the request, and the possible actions by a mediation provider or trainer that might remove the barrier. The facts and circumstances of each particular case should be considered to determine, through the interactive process with the party, whether one of the possible solutions provided here, or another solution, will be appropriate to remove the barrier to mediation participation.

<table>
<thead>
<tr>
<th>Request</th>
<th>Some Possible Barriers</th>
<th>Some Possible Solutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transportation-related issues.</td>
<td>• No accessible transportation available.</td>
<td>• Change mediation location to site to which party can</td>
</tr>
</tbody>
</table>
- Available transportation is unreliable, hours of operation do not coincide with meeting times, has reservation restrictions that prevent party from reserving it when needed for mediation.
- Party unable to use available transportation.
- Private accessible transportation is cost prohibitive for party.

<table>
<thead>
<tr>
<th>Available transportation issues</th>
<th>Solutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hold session by telephone conference call.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Accessible parking.</th>
<th>Solutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Create a temporary accessible parking space</td>
<td></td>
</tr>
<tr>
<td>Offer to meet party at drop-off point and &quot;valet park&quot; car for her, and retrieve car at end of meeting.</td>
<td></td>
</tr>
<tr>
<td>Reimburse party for parking lot or garage fee incurred to obtain accessible parking space, if non-accessible parking is available at no cost to the other mediation participants</td>
<td></td>
</tr>
<tr>
<td>Select a different meeting site that is accessible.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Accessible route to meeting room.</th>
<th>Solutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Install temporary or permanent ramp(s), curb cuts, or stair lift; remove cause of slippery surfaces and apply non-slip covering.</td>
<td></td>
</tr>
<tr>
<td>Identify alternative accessible route.</td>
<td></td>
</tr>
<tr>
<td>Select a different route that is accessible.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Assistance with opening doors.</th>
<th>Solutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify alternative accessible route that avoids the doors that are causing the barrier.</td>
<td></td>
</tr>
<tr>
<td>Escort the person on arrival and exit, opening doors for travel.</td>
<td></td>
</tr>
<tr>
<td>Assistance with locating or operating elevator.</td>
<td>Assistance with verbal communication.</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>• Unsafe/unable to use revolving door.</td>
<td>• Limitations in speaking, hearing, or comprehending.</td>
</tr>
<tr>
<td>• Space on user side of door too small to accommodate person during opening process.</td>
<td>• Difficulty identifying who is speaking.</td>
</tr>
<tr>
<td>• Doors along accessible route are locked.</td>
<td>• Difficulty following or understanding complex sentences or long speeches.</td>
</tr>
<tr>
<td></td>
<td>• Communicate in writing (TDD, fax, e-mail, CART, written or typed documents/notes, captioning).</td>
</tr>
</tbody>
</table>

- Escort the person on arrival and exit, operating the elevator for him.
- Change meeting place to room that is accessible without use of elevator.
- Select an alternative meeting site that is accessible.
- Speak clearly, face the party, make sure the party can see your lips when speaking.
- Speaking louder when requested (NOTE: with certain hearing impairments, this distorts rather than amplifies the sound)
- Have only one person speak at a time.
- Provide sign language interpreter services.
- Allow party ample uninterrupted time to express himself. Do not complete sentences for the party without permission.
- If you can't understand the party, ask for clarification in
<table>
<thead>
<tr>
<th><strong>a respectful manner, ...</strong> e.g., “what I understood you to say was ...,” and repeat what you thought the party said.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>If complexity or length of speech is a problem, use simple words and concepts that the party understands.</strong></td>
</tr>
<tr>
<td><strong>Periodically confirm that the person has understood what has been communicated.</strong></td>
</tr>
<tr>
<td><strong>Never assume that the person might not hear or understand statements you intend only for others.</strong></td>
</tr>
<tr>
<td><strong>Assistance with written communication.</strong></td>
</tr>
<tr>
<td><strong>Can't see writing due to vision or mobility impairment.</strong></td>
</tr>
<tr>
<td><strong>Can't understand writing due to cognitive impairment, or has not learned to read written language due to disability.</strong></td>
</tr>
<tr>
<td><strong>Unable to write due to disability.</strong></td>
</tr>
<tr>
<td><strong>Convert text to large print, Braille, or audio tape.</strong></td>
</tr>
<tr>
<td><strong>Read text to party.</strong></td>
</tr>
<tr>
<td><strong>Provide visual interpreter services/reader.</strong></td>
</tr>
<tr>
<td><strong>Ensure party has appropriate method to approve and sign documents.</strong></td>
</tr>
<tr>
<td><strong>Specific times to meet or specific break periods due to disability-related fatigue, medical treatment, medication, etc.</strong></td>
</tr>
<tr>
<td><strong>Mediation schedule conflicts with disability-related schedule that cannot be changed.</strong></td>
</tr>
<tr>
<td><strong>Mediation schedule creates fatigue or other problem for party's health.</strong></td>
</tr>
<tr>
<td><strong>Party unable to maintain concentration and comprehension for prolonged periods of time.</strong></td>
</tr>
<tr>
<td><strong>Find out what days, times, and schedule work best for the party.</strong></td>
</tr>
<tr>
<td><strong>Consider amount of time it takes for party to get to/from mediation site when scheduling mediation.</strong></td>
</tr>
<tr>
<td><strong>Schedule mediation sessions and meetings so that they do not conflict with the party's disability-related needs.</strong></td>
</tr>
<tr>
<td><strong>Control of environmental factors.</strong></td>
</tr>
<tr>
<td><strong>Party's sensitivity to light, noise, chemicals, temperature or other factors can trigger adverse reactions - such as decreased</strong></td>
</tr>
<tr>
<td><strong>Eliminate adverse environmental factors or reduce to level which eliminates the barrier to</strong></td>
</tr>
<tr>
<td>Permission for personal assistant to accompany throughout mediation process.</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Reminders about what is being discussed, roles of others who are present, etc.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>An accommodation that cannot be provided because it poses significant difficulty or expense or a fundamental alteration of the mediation provider's business.</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

### Appendix B - Sample EEO Mediation Intake Form
This is a sample form that may be useful for mediation intake personnel to use or customize for a particular mediation program. It is intended to prompt the intake personnel to: (1) inquire whether any accommodations may be needed for the mediation process; (2) take appropriate action to respond to accommodation requests; and, (3) provide any information regarding accommodation requests to the mediator at the time the case is assigned by forwarding a copy of this form.

Case Number ______________

Date: __________________

1. Charging Party/complainant/employee contact information:
Name ____________________________ Work location/Branch

Work telephone: _______________ Home telephone: _______________ E-mail: _______________

2. Currently assisted in process by:
Name _______________ Role: _______________ (attorney, union rep., advocate, other (specify))
Firm/Organization: _____________________ Work telephone: _____________________
E-mail: _____________________ Will this person attend mediation? Yes No Unknown

3. Respondent/management official/agency representative contact information:
Name ____________________________ Work location/branch:

Work telephone: _______________ E-mail: _______________

Circle one: management official agency representative other (specify) _______________

4. Accommodation requests for the mediation process (ask parties and relay any requests promptly to mediator):
Party requesting accommodation:
Accommodation requested:
5. Status of any accommodation requests for the mediation process (Indicate what arrangements made by intake personnel, or whether accommodation requests have been forwarded to mediator to process):

_____________________________________________________________
_____________________________________________________________
_____________________________________________________________

6. Mediator Information and Mediation Logistics

Primary Mediator: ____________________ Co-mediator: ____________________

Other Mediators: ____________________ Role: Trainee Other ____________________

Location of Mediation: ____________________________________________

Date of Mediation: ____________________ Time of Mediation: ____________________

Name of Location Contact Person: ____________________ Telephone: ____________________
E-mail: ____________________

Appendix C - SELECTED RESOURCES

FEDERAL AGENCIES

U.S. Equal Employment Opportunity Commission (EEOC)
1-800-669-4000 (voice)
1-800-669-6820 (TTY)

http://www.eeoc.gov

EEOC Publications Center:
1-800-669-3362 (voice)
1-800-800-3302 (TTY)

EEOC private sector mediation programs:
http://www.eeoc.gov/mediate/index.html
The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act, which prohibits discrimination against individuals 40 years of age or older; sections of the Civil Rights Act of 1991; the Equal Pay Act; Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments; and Section 501 of the Rehabilitation Act of 1973, prohibiting disability discrimination in federal government employment. In addition to mediation, investigation, and litigation, EEOC provides extensive technical assistance to employers and employees.

U.S. Department of Justice
Civil Rights Division
Disability Rights Section
ADA Information Line
1-800-514-0301 (voice)
1-800-514-0383 (TTY)
http://www.ada.gov

The Department of Justice investigates and litigates claims under Titles II and III of the ADA, and also litigates cases against public employers under Title I of the ADA. The Department also provides education and technical assistance to businesses, State and local governments, and individuals with rights or responsibilities under the ADA through a variety of means to encourage voluntary compliance. Activities include providing direct technical assistance and guidance to the public through a toll-free ADA Information Line, an internet ADA Home Page, and Fax on Demand, developing and disseminating technical assistance materials to the public, undertaking outreach initiatives, and coordinating ADA technical assistance government-wide.

National Council on Disability
202-272-2004 (voice)
202-272-2074 (TTY)
http://www.ncd.gov

The National Council on Disability (NCD) is an independent federal agency making recommendations to the President and Congress on issues affecting Americans with disabilities. NCD's overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic
self-sufficiency, independent living, and inclusion and integration into all aspects of society.

**Access Board**
1-800-USA-ABLE (V/TTY)
[http://www.access-board.gov](http://www.access-board.gov)

The Access Board is an independent federal agency devoted to accessibility for people with disabilities. Key responsibilities of the Board include: developing and maintaining accessibility requirements for the built environment, transit vehicles, telecommunications equipment, and for electronic and information technology; providing technical assistance and training on these guidelines and standards; and enforcing accessibility standards for federally-funded facilities.

**OTHER RESOURCES**

**American Bar Association (ABA) Commission on Mental and Physical Disability Law**
(202) 662-1570
[http://www.abanet.org/disability](http://www.abanet.org/disability)

ABA's Commission on Mental and Physical Disability focuses on the law-related concerns of persons with mental and physical disabilities through a variety of activities and publications. Its mission is "to promote the ABA's commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities and their full and equal participation in the legal profession." The Commission's members include lawyers and other professionals, many of whom have disabilities.

**ADA Disability and Technical Assistance Center (DBTAC)**
1-800-949-4232 (V/TTY)
[http://wwwadata.org](http://wwwadata.org)

There are ten regional DBTAC centers throughout the United States that act as a one-stop comprehensive resource on ADA issues in employment, public services, public accommodations, and communications. Each DBTAC center works closely with local business, disability, governmental, rehabilitation, and other networks to provide ADA information and assistance. Programs vary in each region, but all of the centers provide technical assistance, education and training, materials, information and referrals, among other services.
Appendix D - Checklist of Frequently-Raised Legal Issues in Workplace Reasonable Accommodation Cases under the Americans with Disabilities Act (ADA)

I. Does the individual have an impairment that meets the definition of "individual with a disability" under the ADA?
   
   A. What is the physical or mental impairment?
   
   B. Does the physical or mental impairment substantially limit one or more major life activities, or does the individual have a record of such an impairment, or is the individual regarded as having such an impairment?
      
      1. What major life activities are affected? (e.g., caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working (impact on ability to perform class of jobs or broad range of jobs in various classes), sitting, standing, lifting, reaching, reproduction, and processes such as thinking, concentrating, and interacting with others)
      
      2. Does the individual use mitigating measures (e.g., medication, insulin, prosthetic limb, hearing aid, etc.)
3. Do mitigating measures control the symptoms of the impairment such that they are not substantially limiting?

II. Is the individual qualified?

A. Can the individual perform the essential functions of the position held or desired with or without accommodation?

B. If the individual cannot perform the essential functions of his current position, has it been considered whether he could perform the essential functions of an existing vacant position for which he is qualified and to which he could be reassigned?

III. Accommodation

A. Did the individual request accommodation, or alternatively was the need for accommodation obvious or already known?

B. Did the employer engage in an interactive process to clarify individual needs and appropriate reasonable accommodation?

C. Is there an available reasonable accommodation? Some examples include:

1. Job restructuring (reallocating or redistributing marginal job functions or altering how or when essential or marginal functions are performed)

2. Physical modifications to facilities (e.g., rearranging furniture to create uncluttered path for an employee in a wheelchair or a blind employee)

3. Use of accrued paid leave, or granting unpaid leave

4. Modified or part-time schedule

5. Modifying a workplace policy (e.g., permit eating or drinking at workstation for diabetic, or modification of break schedule to permit employee to take medication)

6. Telework where suited to the duties being performed.

7. Reassignment to a vacant position.

IV. Undue Hardship -- Would the proposed accommodation pose an undue hardship on the employer, i.e., significant difficulty or expense?
V. Direct Threat

A. Is direct threat to safety (significant risk of substantial harm to health or safety of self or others that cannot be eliminated or reduced by reasonable accommodation) implicated by the proposed accommodation solution? See 29 C.F.R. § 1630.2(r).

- Determination that a direct threat exists must be based on an individualized assessment of the applicant/employee's present ability to safely perform the essential functions of the job, considering reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. Factors to be considered: (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood the potential harm will occur; (4) imminence of the potential harm.

If there is a direct threat to safety, can the threat be reduced or eliminated by an alternative or additional accommodation?

Appendix E - Selected References Regarding Mediation and ADA

Selected EEOC ADA Publications

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (as revised, October 17, 2002)
http://www.eeoc.gov/policy/docs/accommodation.html

Questions and Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (October 20, 2004)
http://www.eeoc.gov/facts/intellectual_disabilities.html

Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (July 28, 2004)
http://www.eeoc.gov/facts/epilepsy.html

Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (October 29, 2003)
http://www.eeoc.gov/facts/diabetes.html
EEOC Fact Sheet on Work At Home/Telework as a Reasonable Accommodation (February 3, 2003)
http://www.eeoc.gov/facts/telework.html

http://www.eeoc.gov/ada/adahandbook.html

Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (July 6, 2000)
http://www.eeoc.gov/policy/docs/fmlaada.html

http://www.eeoc.gov/policy/docs/psych.html

Selected References on Mediation and ADA by other sources

Disclaimer: The views expressed in the reference materials included on this list are those of the authors or issuing agencies, and not necessarily those of the U.S. Equal Employment Opportunity Commission, the U.S. Department of Justice, or the National Council on Disability.


ADA Mediation Guidelines (2000)
http://www.cojcr.org

http://www.keybridge.org/med_info/ada/ada_mediator_standards.htm

"Considerations for Mediating with People who are Culturally Deaf," Annette Leonard, Deb Duren, and John Reiman

http://www.mediate.com/articles/cohen6.cfm#

"Facilitation of ADA Reasonable Accommodation Disputes," Sara Adler, American Bar Association (1999)

http://www.acrnet.org/pdfs/guidelines.pdf

http://mediate.com/articles/miller1.cfm

"Making Mediation Sessions Accessible to People with Disabilities," Judy Cohen, SPIDR NEWS (Spring 1997)
http://www.mediate.com/articles/cohen.cfm

"Maximizing Effective Participation," Patricia Porter, Alternatives to the High Costs of Litigation, Vol. 21, No. 6 at 117 (June 2003)
http://www.cpradr.org

"Mediating Employment Disputes Under the Disabilities Act," Samuel H. DeShazer and Judy Cohen
http://www.mediate.com/articles/cohenada.cfm

http://www.mediate.com/articles/dupreeD.cfm

"Mediation Capacity: It is Not a Disability Issue," Kathleen A. Blank, Alternatives to the High Costs of Litigation, Vol. 21, No. 6 at117 (June 2003)
http://www.cpradr.org

"Practice Standards for ADA Mediators," Key Bridge Foundation (1999)
http://www.keybridge.org/med_info/ada/adamediator_standards.htm

http://www.mediate.com/articles/cohenawareness.cfm

"Tenets of Effective ADA Mediation," Institute for ADA Mediation
http://www.mediate.com/articles/IforADA.cfm
1. The principles for ensuring accessibility of the mediation process are discussed here in general terms that apply to all mediation providers and participants who may be covered under the ADA or the Rehabilitation Act, as well as others who may voluntarily adopt those principles as best practices. The ADA prohibits disability discrimination by private employers, state and local governments, and public accommodations; the Rehabilitation Act contains similar anti-discrimination rules that apply to executive branch federal government agencies as well as various federally funded programs and activities. For purposes of this document, the term "ADA" is generally used to refer to both the ADA and the Rehabilitation Act.

2. Although this guide focuses on mediation, it will generally also apply to other types of Alternative Dispute Resolution (ADR), such as conciliation, early neutral evaluation, or settlement conferences.

3. The term "reasonable accommodation" is used in this document to refer not only to "reasonable accommodation" in employer-sponsored mediation programs, but also "reasonable modifications of policies, practices, and procedures," the provision of "auxiliary aids and services," and other similar changes that provide accessibility for people with disabilities in private and government-sponsored mediation programs. "Auxiliary aids" include such services or devices as qualified interpreters, assistive listening devices, telecommunications devices for deaf persons ("TDD" or "TTY"), readers, taped texts, Brailled materials, and large print materials.


5. To obtain more information regarding the accessibility and design requirements for new construction, barrier removal in existing facilities, and other site accessibility issues, contact the U.S. Department of Justice ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TDD), or the Architectural and Transportation Barriers Compliance Board ("Access Board") at (800) USA-ABLE (1-800-872-2253).

6. In employer-provided mediation, there is additionally an ADA obligation requiring the employer and the mediator to keep the employee's medical information confidential. This obligation applies to the employer when it
conducts the mediation in-house, as well as to any mediation provider retained by the employer that is acting as the employer's agent.


8. NOTE: It is important to discuss with the party requesting accommodation exactly what type of interpretation services are needed. There are different types of interpretive services available and different types of sign language. The interpreter selected should be qualified to provide the type of interpretation that the party needs. For example, a person who uses finger spelling rather than American Sign Language requires a sign language interpreter who will interpret with finger spelling. Similarly, a person who is deaf and blind might need an interpreter who can translate manually (communicates tactiley into party's hand). It is also important to make sure that the interpreter you use is familiar with how to interpret the terminology used in the mediation process.
Session 8

**Prof. Jane Wettach**, Director
Children's Education Law Clinic
Duke University Law

School Review of Recent Litigation
Case Law update – 2009 to present

Presented by Jane R. Wettach
Clinical Professor of Law
Duke University School of Law

U.S. Supreme Court


Parents of student who has never received special education services from the district may still be entitled to tuition reimbursement for placement in private school, particularly when, as here, the district evaluated the student and found him ineligible for special education.

In this case, the Supreme Court took up the issue of whether the 1997 amendments to the IDEA categorically prohibit reimbursement for private education costs if a child has not previously received special education and related services under the authority of the public agency. The 1997 amendments to 20 U.S.C. § 1412(a)(10)(C) included the following provision: a “court or hearing officer may require [a public] agency to reimburse the parents for the costs of [private school] enrollment if the court or hearing officer finds that the agency had not made a fee appropriate public education available” and the child has “previously received special education and related services under the authority of [the] agency.”

In Forest Grove, the student attended public school into his junior year of high school. While he experienced problems with attention and other academic difficulties, he did not receive special education services. The district evaluated him when he was a freshman in high school and informed his parent that he did not qualify for special education services. By his junior year in high school, his problems worsened, and his parents enrolled him in a private school that focused on students with learning problems. The parents thereafter provided notice to the school district of the placement, and requested a due process hearing regarding the student’s eligibility for special education. The parents cooperated with the district’s evaluation of their son, a process which resulted in the district determining that the student was not qualified for special education services. The student continued to attend private school for his senior year in high school.

The hearing officer determined that the district had violated the IDEA when it erroneously found that the student was ineligible for special education services. Because the district had not offered at FAPE to the student, and because the private school was appropriate, the hearing officer awarded tuition reimbursement. The district court reversed the hearing officer, but the Court ofAppeals reversed the district court.

At the Supreme Court, the majority relied on the previous case of School Committee of Burlington v. Dept of Educ. of Mass., 105 S. Ct. 1996 (1985) in which the Court held that parents can be awarded tuition reimbursement if they have unilaterally enrolled a child in private school when the district has failed to offer a FAPE. This rule was based on the Act’s language that a court could grant appropriate relief in an IDEA case. The Court saw no meaningful distinction
between the situation in Burlington, in which the child received special education services from the school district prior to enrollment in private school, and in this case, in which the child never received special education because his eligibility was denied. The Court was unwilling to accept the school district’s argument that the 1997 amendments to the Act changed its interpretation of the still extant language authorizing appropriate relief. The amendments included language that a court or hearing officer “may require a [public] agency to reimburse parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available” and the child has “previously received special education” under the authority of the agency. The Court held, however, that this new language did nothing to change the Burlington analysis and did not make this section the sole avenue for obtaining tuition reimbursement. Such a reading, the Court found, would be at odds with the general remedial purposes underlying the IDEA and leave parents without an adequate remedy when the school district unreasonably failed to identify a child with disabilities.

**Ninth Circuit**

- **IEPs**

*R.P. ex rel C.P. v. Prescott Unified School Dist.* --- F. 3d ---, (9th Cir. 2011)

The IEP team for an autistic child need not include an autism expert on the IEP team; teachers have discretion to use an eclectic selection of teaching methods so long as they are reasonably calculated to provide educational benefit; teacher observation of skills was sufficient measurement so long as it was recorded; slow and non-linear progress can be sufficient evidence of FAPE.

C.P. is a child with autism. When he began school at the age of five, an IEP was developed for him. He was placed in a special education classroom and received special education and related services. When he began school he could barely speak, did not respond to his name, ran away from adults, showed no fear in unsafe situations, had a short attention span, and hit, pinched, and spat. By the time he was seven, he could respond to his name, say short phrases, was better able to communicate with adults, and could solve some puzzles. Nevertheless, he was not toilet-trained, could not draw a picture, and his academic skills remained at the preschool level. His parents found his progress to be so minimal as to not constitute a FAPE, and they filed for due process.

The court rejected the various claims made by the parents. The court’s finding rejecting the parents’ contentions include:

- The IEP team was properly constituted, even though it failed to include an autism expert. The IDEA and its regulations do not require such a specialist on an IEP team.
- The services provided to R.P. were appropriate even if, as the parents complained, the teachers chose the methods “they liked” rather than “best practices” that have been demonstrated to be effective. The IDEA accords educators discretion to select from various methods, provided those practices are reasonably calculated to provide the students with educational benefit.
The lack of linear progress on all goals does not mean that the IEP was inadequate. The student’s slow but significant educational progress on many of his goals was sufficient to meet the FAPE standard.


Nothing in the IDEA requires that the student’s current special education teacher participate in the development of the IEP, so long as the special education teacher on the team has at some point taught the student.

The IEP team was convened without the student’s current special education teacher. The special education teacher on the team had taught the student three years prior to the meeting. The parents objected, claiming that the law requires the current special education teacher. Noting that the failure to have the current teacher participate “is difficult to square with the IDEA’s emphasis on a student’s present levels of educational performance and attainment of annual goals” it was nevertheless bound by the case of *R.B. v. Napa Valley Unified School District*, 496 f.3d 932 (9th cir. 2007) which interpreted the IDEA not to require the participation of the current special education teacher so long as the special education teacher had, at some point, actually taught the student.

*A.M. ex rel Marshall v. Monrovia Unified School District*, 627 F. 3d 773 (9th Cir. 2010)

When a child transfers within the state from one district to another, the new district must implement the most-recently implemented IEP; it need not immediately implement an IEP that had been drafted but never implemented in the previous district.

A severely-impaired student with cerebral palsy was receiving special education services from a virtual charter school network. The student’s IEP placed him at his home with an independent study program and multiple in-home therapies. The child’s IEP team met and concluded that his placement should be changed to a general education placement. A new IEP was developed reflecting this change of placement. Because the charter school network did not have a physical location for the student, he transferred to his local school district. Upon his enrollment, the district wanted to continue his placement at home for 30 days to make an assessment of him; the parents wanted the new IEP to be implemented immediately. Over the parents’ objections, the home placement was continued. Difficulties with scheduling the IEP meeting meant that the home placement continued for months. Eventually, the district developed an IEP without the participation of the parents, resulting in a placement not in the general education classroom, but in a special day class in another district. The parents objected and filed due process.

The parents claimed that the district was obligated to implement the current IEP during the initial 30 days. The district claimed that it was appropriate to implement the most recently-implemented IEP (which excluded the new IEP with its placement in the regular classroom). The court looked to the California Education Code provision: When an exceptional-needs student transfers from one California school district to another during the school year, the local
school district shall provide “services comparable to those described in the previously approved [IEP] ... for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP].” Cal. Educ. Code § 56325(a)(1). It also considered the federal law, which states: when an exceptional needs student who “had an IEP that was in effect in the same State” transfers to a new school, the school shall provide services comparable to the “previously held IEP.” 20 U.S.C. § 1414(d)(2)(C)(i)(I). The court agreed with the district’s position that it was required to temporarily implement the last implemented IEP, not one that had never gone into effect.

The case also raised a question regarding the impact of the school holidays on the 30-day requirement. The court noted that there is no authority for the proposition that school holidays toll the time period, though it also found that the delay be the district did not result in any meaningful educational deprivation to the student. Thus, no IDEA violation was found.

**L.M. v. Capistrano Unified School District,** 556 F. 3d 900 (9th Cir. 2009) (amending 538 F.3d 1261)

The school district’s refusal to allow parents’ expert to observe the district’s proposed placement for a 90-minute period, limiting her to 20 minutes at a time, did not significantly affect the parents’ right to meaningfully participate in the development of their child’s IEP.

The student, L.M., was diagnosed at a young age with autism. His parents began an in-home treatment plan for him prior to the age of three. When L.M. turned three, the parents asked the school district to provide the in-home treatment through L.M.’s IEP. The district rejected an in-home placement and offered a school-based placement. The parents requested that L.M.’s psychologist be permitted to observe the proposed program for a continuous 90-minute period, but the district limited observations to 20 minutes at a time. The parents ultimately enrolled their child in a private program and filed a due process petition for tuition reimbursement. The ALJ found that for a portion of time, the district failed to offer FAPE to L.M., because the school-based placement offered insufficient speech-language therapy and an insufficient transition plan. The ALJ rejected the parents’ claim that they were deprived of their right to fully participate in the development of the IEP when the district denied their psychologist the requested 90-minute observation, concluding she was still able to form an opinion and advise the parents.

While the district court found that the limitation on the psychologist’s visit was a violation that deprived the parents of their full right to participate, the Court of Appeals disagreed and reinstated the ALJ’s opinion. The Court emphasized that all procedural violations must be found to have significantly affected the parents’ right to meaningfully participate in the development of the IEP or to have resulted in a loss of educational opportunity. Here, there was no such evidence.

The Court also addressed the issue of the “stay put” provisions of the IDEA. Because the district court had found for the parents on the procedural violation, the parents argued that the educational placement in effect at that time should be the “stay-put” placement. That would have required the district to fund that placement throughout the litigation. The Court of Appeals
rejected the parents’ argument (in an amended opinion that superseded the original opinion published at 538 F.3d 1261 (2008)). Because the district court never got to the issue of whether the private placement was appropriate, it could not be considered the “stay-put” placement.


The failure of district personnel to communicate with parents about the scheduling of an IEP meeting after the parents indicated they were not sure they could attend significantly impaired the parents’ right to meaningfully participate in the development of the IEP; the IEP was thus out of compliance for the entire year.

The school district set a time and date for an IEP meeting without consulting with the parents. The parents informed the district that they were not sure they could attend, and did not return the acknowledgement form. Without making any attempts to communicate with the parents about a more satisfactory date, the district held the meeting without them.

The Court of Appeals found that the district’s actions violated the IDEA and significantly impaired the parents’ right to participate in the formulation of the IEP. As a result of this procedural violation, the student’s IEP for the entire year was out of compliance and he did not receive a FAPE.

- **FAPE**

**J.L. v. Mercer Island School District, 592 F. 3d 938 (9th Cir. 2009)**

The transition services requirement in IDEA does not supersede the *Rowley* standard for determining the nature of a FAPE, even for a high school student approaching the transition from high school.

K.L. was diagnosed with learning disabilities early in her educational career. She attended public school for most of her elementary and middle school years and into high school. She had an IEP that provided her with special education services. Assessments in 9th grade showed that she had an average IQ, but that her comprehension and written language skills were in the extremely low or borderline range. K.L.’s parents unilaterally removed her from public school and enrolled her in a private residential school for children with learning disabilities, the Landmark School, and requested tuition reimbursement. While K.L. was enrolled in private school, the district developed an IEP for her and rejected a placement in private school. The team declined the parents’ request that the Landmark curriculum be incorporated into K.L.’s IEP, or that a particular teaching methodology be utilized by the teachers.

The parents filed for due process; the hearing officer ruled for the district, finding that the district had offered J.L. a FAPE. The district court reversed, finding in particular that the 1997 amendments to IDEA defining transition services superseded the *Rowley* standard. The district court found that the IEP proposed by the district did not sufficiently focus on K.L.’s self-sufficiency and preparation for post-secondary school.
The Court of Appeals reversed, holding that the 1997 amendments do not supersede the *Rowley* definition of FAPE. Other holdings of the court include the following:

- The district did not violate the parents’ procedural rights or “predetermine” the student’s placement by holding a meeting among district personnel prior to the IEP meeting.
- The district was not required to specify a teaching methodology in the IEP upon a finding that there was not a single methodology that would always be effective.
- Failure of the district to include the specific number of minutes of special education instruction was not prejudicial to K.L. and therefore did not deny her a FAPE.

• **Placement**

*Ashland School District v. Parents of E.H.*, 587 F. 3d 1175 (9th Cir. 2009)

A claim for tuition reimbursement for a residential facility can be denied in its entirety when the primary purpose of enrollment is to address the medical, social, or emotional impairments of the child rather than the educational impairments; when the parents did not give specific notice to the district (although the district knew the parents were looking at residential placements and the district personnel did not make the parents aware that the district might be obligated to pay for a residential placement); and when the cost of the residential facility is extremely high.

E.H. was a child eligible for special education services as a result of an emotional disability. He had various educational placements pursuant to his IEP, including placement in an alternative school operated by the district. As the child’s emotional impairments worsened, his parents began looking for a residential placement as recommended by E.H.’s physicians and therapists. The district personnel were aware of their search. In the meantime, the alternative school determined it could not sufficiently monitor E.H. to prevent suicide attempts. E.H. was enrolled at the regular high school for a short period of time, but was unsuccessful there. His parents thereafter enrolled him in a private residential facility. The district offered an IEP which the parents rejected; they filed for due process for reimbursement for the residential facility.

The hearing officer found that the IEP offered by the district did not offer a FAPE; that the residential facility was appropriate; that parents were entitled to some reimbursement, but the reimbursement was reduced because the parents failed to provide proper notice to the district of their intent to enroll their son in the residential facility. The district court reversed, finding, among other things, that the cost of the residential facility was extremely high, the parents’ failure to meet their notice requirements, the medical rather than educational nature of the placement, and the district’s willingness to revise E.H.’s IEP.

The Court of Appeals affirmed. The court acknowledged that the district court could take the high cost of the facility into account, particularly when much of the cost related to E.H.’s medical needs rather than her educational needs. The court accepted the district court’s judgment that reimbursement should be denied to the parents because they failed to give proper notice to the district, even though the district knew they were looking into private facilities. The court rejected the parents’ contention that the district had an obligation to let them know that
under some circumstances, the district would have an obligation to pay for a residential facility. Finally, the court confirmed that the district court could make a judgment about whether the residential placement was necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems. Having concluded that the primary purpose of the residential placement was to address E.H.’s medical problems, the district court did not abuse its discretion in denying reimbursement.

**Ashland School Dist. v. Parents of R.J., 588 F. 3d 1004 (9th Cir. 2009)**

Denial of reimbursement for the costs of a residential placement is proper when the facts fail to establish that the student is incapable of deriving educational benefit in a nonresidential setting. Also, when the primary reason for a residential placement is to address emotional, social, or medical needs, the school district is not responsible for payment.

R. J. was initially found eligible for special education due to problems with ADHD. As she progressed through middle school and into high school, she developed emotional problems. She failed three of five classes in her 9th grade year. She also had exhibited risky sexual behaviors that involved another student and the school custodian. The school district perceived that her problems were primarily problems at home and that school was, “by and large, successful.” R.J.’s parents gave proper notice to the district and unilaterally placed her in two different private residential schools (The second school was more restrictive than the first, after she was not successful at the first.) The parents filed for reimbursement. The ALJ awarded reimbursement for the second of the two residential schools, concluding the first one was not appropriate. The district court reversed.

The Court of Appeals agreed with the district court. It relied on the standard that a private residential facility is appropriate only if it is necessary to provide special education and related services . . . and only when the nature and severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The question of whether a student is incapable of deriving educational benefit outside a residential placement is a question of fact. The focus must be on whether placement in a residential facility was necessary to meet the student’s educational needs as opposed to medical, social, or emotional needs. Here, the student was well-behaved in class and capable of benefitting from education in regular classes (apparently notwithstanding her F’s in a majority of her classes).

- **Procedural matters**

**Compton Unified School Dist. v. Addison, 598 F. 3d 1181 (9th Cir. 2010)**

A due process petition pursuant to the IDEA may include a claim for compensatory services stemming from the district’s passive failure to timely identify a student for special education services, even though it did not actively refuse to initiate an evaluation. Due process petitions are not limited to those items subject to “prior written notice.”
Despite extremely low test scores and teacher reports that Addison’s work was “gibberish and incomprehensible,” the district did not make any efforts to obtain her parent’s permission to evaluate the student for special education. After receiving a formal request for evaluation from the parent, the district evaluated the student and found her eligible for special education services. The student sought compensatory services in light of the district’s failure to identify her needs and provide services to her. The ALJ found in the student’s favor, a decision that was affirmed by the district court.

The Court of Appeals affirmed. The court rejected the district’s argument that the student did not have a cognizable claim for the lack of identification. The district relied on the IDEA provision requiring it to provide written notice whenever the district “refuses to initiate or change the identification, evaluation, or placement of a child. Because the district did not actively refuse to initiate the identification, assessment or educational placement, it argued, it could not be held accountable in due process. The court rejected the district’s position, holding that it did not comport with the Congressional intent in passing the IDEA of properly identifying children who need special education. A student may initiate a due process complaint regarding any matter relating to identification, evaluation or educational placement.

**Lake Washington School District No. 414 v. Office of Superintendent, --- F. 3d --- (9th Cir. 2011)**

A hearing officer may grant requests for continuances made by the parents, even if it resulted in a decision being made outside the required time limits, because the time limits exist to protect the parents, not the district.

The parents brought a due process action in the Office of Administrative Hearings. The case was set for hearing, but the parents’ counsel asked for a continuance for several months. The continuance was granted. The school district brought suit in federal district court, asking for an injunction to require the state agency to proceed with the hearing within the 45 days mandated by statute. The district court dismissed the action on the basis of lack of standing. This decision was affirmed. The court of appeals analyzed the procedural requirements of the IDEA, finding that they are they for the protection of parents and children, not the school district. Thus, the school district had no standing to raise a complaint against the lack of timeliness.

**Other Circuit Courts of Appeals**

- **Eligibility**

**Hansen ex rel J.H. v. Republic R-III School Dist., --- F.3d --- (8th Cir. 2011)**

When a child diagnosed with ADHD, bipolar disorder and conduct disorder has consistent behavior problems that result in suspension and performs very poorly in classes as well as on standardized tests, he meets the definition of a child with an emotional disability who is in need of special education.
After an evaluation, the district found J.H. ineligible for special education services. His father challenged the eligibility decision through a due process petition. The evidence showed that J.H. was diagnosed with ADHD, conduct disorder, and bipolar disorder as early as the fifth grade. He was suspended numerous times for threatening his classmates and teachers, had made suicidal comments on multiple occasions, and had consistently performed poorly in his classes and on standardized tests. His father argued that he met the definition of a child with a serious emotional disability. The district characterized J.H. as “socially maladjusted,” which would exclude him from the definition of “emotionally disabled.” Contrasting J.H. to the student in *Springer v. Fairfax County School Board*, 134 F.3d 659 (4th Cir.1998), who was found to be socially maladjusted rather than emotionally disturbed, the court noted that J.H.’s academic progress was very poor and his ability to maintain satisfactory personal relationships was lacking over a long period of time. The court also found that J.H.’s ADHD qualified him for special education under the category of “Other Health Impaired” because his impulsivity, inattention, and hyperactivity all adversely affected his educational performance.

**Marshall Joint School District No. 1 v. C.D., 616 F3d 632 (7th Cir. 2010)**

A child who needs only related services, and not special education, is not a child with a disability for purposes of eligibility for special education under the IDEA.

Facts: The student, C.D., was diagnosed with Ehlers-Danlos Syndrome (“EDS”). This genetic disease, causing double-jointedness, resulted in poor upper body strength and poor postural and trunk stability, as well as chronic and intermittent pain. He was initially found eligible for an IEP and received adaptive physical education, physical therapy, occupational therapy, assistive technology, supplemental aids and services, and program modifications in his academic classes (including positioning aids; extra time to complete academics; a tape recorder, dictation and limited writing assignments, a special chair and a slant board.

When C.D. was reevaluated, the IEP team determined he was no longer eligible for an IEP. They determined that he was performing at grade level and that his needs could be met in the regular education setting with some slight modifications for his medical and safety needs, such as rest breaks. For physical education, the team determined, a health plan could be crafted by his physicians and the school nurse, to limit his repetitions in certain activities and provide alternative means for completing others.

At the hearing, the ALJ found that C.D. continued to need adaptive physical education and continued to be eligible for special education. The ALJ credited the opinion of one of C.D.’s physicians who said that the EDS caused him pain and fatigue that can affect his educational performance. The ALJ found that the student’s condition adversely affected his ability to fully and safely participate in physical education and that he needed special education to meet his unique needs. The district court affirmed.

The Court of Appeals reversed. It found that the ALJ used the wrong standard. “It is not whether something, when considered in the abstract, *can* adversely affect a student's educational
performance, but whether in reality it does.” The court found there was no substantial evidence in the record that C.D.’s condition, in fact, adversely affected his educational performance.

In addition, the IEP team concluded that C.D. did not need special education, as all of C.D.'s safety needs could be met through a health plan implemented in his regular gym class. The school felt it could address his needs by simply limiting his repetitions and ameliorating the potentially harmful aspects of gym. The court found that the modifications to certain activities of the regular gym class were not special education.

The court rejected the idea that a physician could prescribe special education; it said that the need for special education is the decision of the IEP team. Finally, while the court acknowledged the student’s need for related services, such as physical and occupational therapy, it held that the need for such related services is not sufficient to qualify a student for special education when the student is not otherwise qualified for special education.

• IEPs

_Lathrop R-II School Dist. v. Gray_, 611 F. 3d 419 (8th Cir. 2010)

An IEP is not deficient because it does not contain objective baseline data so long as it contains statement of the child’s present levels of educational performance and a statement of measurable goals. Further, an IEP is not deficient because it does not contain behavioral goals for a child with behavioral needs, so long as the behavior needs are considered and appropriate behavioral interventions are being employed by the district personnel.

D.G. was an autistic student with significant symptoms including academic deficits and disruptive behaviors. His parents claimed that he had been denied a FAPE because his IEP was not appropriate. Among their claims was that the IEP contained no baseline data. The administrative panel agreed with their claim, finding that “[i]f an objective states a student will perform a skill, and the student already knows that skill, mastering that objective would not show any progress.”

The court of appeals rejected that standard, finding that the IEP must include only “a statement of the child's present levels of educational performance,” including “how the child's disability affects the child's involvement and progress in the general curriculum[,]” and “a statement of measurable annual goals, including benchmarks or short-term objectives .]” The court determined that the challenged IEPs contained both detailed present level statements and measurable goals. For example, in one IEP, the section on the student’s present levels was twelve pages long; it elaborated on how D.G.'s disability affected his ability to access the general curriculum and discussed areas including his health, motor skills, sensory processing abilities, cognitive and adaptive behaviors, academic abilities, speech, and social skills. It enumerated twenty seven distinct and specific goals, each with internal benchmarks and most indicating D.G.'s present ability relative to the goal.
The parents also claimed that the IEP did not provide a FAPE because it did not contain behavioral goals. The court again rejected the parents’ position, holding that the IEP does not have to contain behavioral goals; the law requires only that the IEP team consider, when appropriate strategies, including positive behavioral interventions, strategies and supports to address that behavior. The court found that the IEP described D.G.’s disruptive behaviors and included a behavior intervention plan containing strategies to assist D.G. with his behavior. That was sufficient to meet the standards of the IDEA.

The Court also rejected the parents’ position that the IEP should be determined inadequate because D.G. did not make behavioral progress. The court found that D.G. made meaningful progress on many of his academic goals and that the IDEA does not require behavioral progress. The court was impressed by the “good faith effort” put forth by the district, which included training for staff, the use of a one-on-one full time para-professional, and a variety of tailored positive behavioral interventions.

- **FAPE**

**D.S. v. Bayonne Board of Educ.**, 602 F.3d 553 (3d Cir. 2010)

> A student’s high grades are not necessarily indicative of progress, especially when those grades are for work in the special education class and not for work at grade level.

D.S. had a history of epileptic seizures and brain tumors. Surgery corrected some of his problems and he attended his local public school. His education was delivered pursuant to an IEP, but he was not keeping up with the level of instruction. By high school, D.S. was struggling to keep up, both academically and socially. Based on outside evaluations, D.S.’s parents concluded that his IEP was not offering him a FAPE. Despite the conclusions by the outside evaluators that D.S.’s skills were deficient, D.S. was awarded high grades in his classes. After an extensive due process hearing, the ALJ concluded that the IEP was not sufficient to address D.S.’s educational needs. The goals did not address his need for reading and language remediation, speech therapy, and did not address his memory deficits and weak auditory processing. The ALJ credited the testing done by the psychologists over the high grades in determining that D.S.’s educational needs were not being met. The ALJ also found that the private school selected by his parents was appropriate.

The district court reversed, relying on the high grades and testimony that some of the recommendations of the private evaluators were being used by D.S.’s teachers. The Court of Appeals reversed the district court’s decision. The court agreed with the ALJ that the student’s high grades were insufficient to show that the student was receiving a FAPE. It noted that passing from grade to grade may be indicative of progress, but it is not necessarily proof that the child is receiving a FAPE. Particularly when a student is receiving his education in special education classrooms, rather than in the regular classrooms, the grades in those classes may be quite disconnected from progress in regular classes. When a student is not being educated in the regular classroom, the importance of judging his progress by using standardized testing is greater.
**C.H. v. Cape Henlopen School Dist.,** 606 F.3d 59 (3d Cir. 2010)

Without evidence of loss of educational benefit, the absence of a valid IEP on the first day of the school year is not *per se* a denial of FAPE.

A student with disabilities was in private school at school district expense for the school year 2005-06, pursuant to a Settlement Agreement between parents and school district. There was uncertainty about whether C.H. would continue to attend the private school or attend public school the following year. The district obtained permission to conduct an evaluation of the child and did so during the summer months. One meeting was scheduled before school resumed in the fall to review the evaluation and to develop an IEP for the 06-07 school year; the parents attended that meeting, but the IEP was not completed at that time. District officials attempted to schedule another meeting before the beginning of the school year, but the parent was unavailable until after the year began. Thus, no IEP was in place on the first day of school. C.H. did not attend the public school on the first day of school; instead he continued his schooling at the private school and the parents filed for due process. They did not attend any more meetings with the district to complete the IEP and withdrew permission for an additional evaluation.

The Court of Appeals ruled for the school district. Although it did not have an IEP in place on the first day of school, it was the parents’ unavailability that resulted in the delay. The court stated, “we decline to hold that a school district is liable for procedural violations that are thrust upon it by uncooperative parents.” In addition, because C.H. never attended the public school that year, it was not possible to determine whether the failure of the district to have an IEP in place on the first day of school resulted in a loss of educational benefit for C.H. Without evidence of loss of educational benefit, the court was unwilling to establish a *per se* rule that any specific period of time without an IEP is a denial of FAPE.

The Court of Appeals also justified its ruling for the school district on equitable grounds because of the parents’ lack of notice to the district and lack of cooperation. The parents did not give the district 10 days’ notice of their decision to enroll C.H. in private school for the 06-07 school year. They thereafter decline to participate in the re-scheduled IEP meeting and declined permission for the district to conduct a further evaluation of C.H. The court rejected the parents’ position that the “stay put” provision of IDEA allowed them to cease cooperating with the district once they had filed for due process.

**Houston Independent School Dist. v. V.P.,** 582 F.3d 576 (5th Cir. 2009)

Despite the student’s promotion from first to second grade, the IEP did not offer a FAPE when it mainstreamed the student beyond her capabilities and did not address all of her impairments. In addition, lack of FAPE was reflected by lack of coordination of services and communication among providers.

V.P. was a child with hearing and speech impairments. She attended public school beginning in kindergarten pursuant to an IEP. She was generally mainstreamed, with classroom
accommodations, and with a program of speech therapy. Part way through V.P.’s first grade year, additional classroom modifications were added as well as work with an itinerant teacher for the auditorily-impaired for an hour per week. The IEP developed for V.P.’s second grade year was substantially similar to the previous one. The parent expressed disagreement with the IEP, believing her daughter needed a more intensive program in a more restrictive environment. When the team disagreed, the parent provided notice that she was withdrawing her daughter from public school and enrolling her in a private school for children with language-learning disabilities. V.P.’s parents filed for due process to obtain tuition reimbursement.

In defending the claim, the district pointed to V.P.’s promotion from first to second grade under the same standards that applied to non-disabled peers. It also argued that it was not obliged to provide an education that remediated the disability or ensure optimal progress.

The Court of Appeals measured the program using its four-factor test. The IEP should be measured against whether 1) the program is individualized on the basis of the student’s assessment and performance; 2) the program is administered in the least restrictive environment, 3) the services are provided in a collaborative and coordinated manner by the key stakeholders, and 4) positive academic and non-academic benefits are demonstrated. Considering these factors, the Court found:

- The services offered did not address V.P.’s auditory processing difficulties by failing to provide noise desensitization, sequencing training, and gap-detention work.
- The general education classroom was not the least restrictive environment because V.P. was unable to obtain an appropriate education there. The evidence showed that V.P. was mainstreamed beyond her capabilities, and thus she was not receiving a meaningful education.
- V.P.’s program was not coordinated, inasmuch as the teachers and therapists did not communicate with one another except at IEP meetings and were not adequately trained.
- Although V.P. met – barely – the standards for promotion, her teacher testified that she had not mastered the curriculum necessary to be successful in the next grade. She would not have made passing grades without modifications beyond those included in her IEP, such as a reduced number of test items.

Overall, the Court found that V.P. was not receiving meaningful educational benefit from the services provided for her under her IEP. Thus, her parents were entitled to tuition reimbursement, for both the second grade (the subject of the initial due process petition) as well as the following year. The following year was the “stay put” placement, given that the ALJ found the IEP deficient and the private school appropriate.
• **Placement**


When a school district does not offer a preschool program for typically-developing children but does offer a special education preschool, the district need not first determine if the child’s needs can be met in a mainstream classroom.

Upon a finding that R.H. was a child with a disability (autism), the district placed him in a special education preschool. The parents enrolled him in a private school where he had greater exposure to typically-developing peers. The ALJ, and later the court, credited the testimony of the district personnel that R.H. needed a low staff-to-student ratio, a special education teacher with knowledge of autism and regular collaboration with a speech pathologist. Because these needs could not be met in the more mainstream preschool, the district was justified in placing him in the special education preschool. The court rejected the parents’ argument that because the district did not offer a preschool for typically-developing children, it should have first considered whether it could provide the required support in a private preschool program for non-disabled children. The court found that private school placement is the exception, not the rule, under the IDEA, even here where there is no public school mainstream option. Finally, the court rejected the parents’ argument that he should have been placed at the private preschool because he was happier and developing better than in the public, special education preschool. Because he was making some progress in the public preschool program and the IEP was reasonably calculated to enable him to receive educational benefit, the parents were not entitled to tuition reimbursement.

*Richardson Independent School Dist. v. Michael Z.*, 580 F. 3d 286 (5th Cir. 2009)

For a residential placement to be appropriate under the IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education.

Leah Z. had diagnoses of ADHD, oppositional defiant disorder, autism, bipolar disorder, separation anxiety, and pervasive developmental disorder. She attended public schools pursuant to an IEP through grade school and middle school. She had behavioral and academic problems that worsened as she got older. In high school, she began skipping school almost daily and often engaging in sexual activity in the school bathroom. She was often disruptive in class. Her parents unilaterally removed her from public school and enrolled her in a residential facility. While there, she attended an on-site public charter school. The parents later asked the IEP team to consider placing her there, but the team concluded it could provide Leah a FAPE in the public school and developed an IEP for her. The parents filed for due process.

The ALJ and the district court ruled for the parents, finding the IEP developed by the district was not appropriate to meet her needs. On appeal, the Court of Appeals invoked its four-factor test: whether 1) the program is individualized on the basis of the student’s assessment and performance; 2) the program is administered in the least restrictive environment, 3) the services
are provided in a collaborative and coordinated manner by the key stakeholders, and 4) positive academic and non-academic benefits are demonstrated. The evidence showed that Leah has regressed under the substantially-similar IEPs previously in place and the district had shown itself to be unsuccessful in addressing Leah’s problem of refusing to attend classes. The evidence revealed little to no meaningful academic progress. The court of appeals therefore agreed that the IEP offered by the district did not provide FAPE.

The Court of Appeals then addressed the issue of whether Leah’s placement at the residential facility was proper under the IDEA. It emphasized that even though the facility chosen by the parents was a private/public combination, it was reimbursable as long as it was proper under the IDEA; it need not meet every procedural requirement of the IDEA. The Court then considered what test to use to determine whether a residential facility is proper. It noted that the Third Circuit has found a residential facility to be proper when the child’s social, emotional and educational problems are inextricably intertwined, and that the Seventh Circuit has found such a facility to be proper only when the placement at the residential facility is primarily for enabling education. It then adopted its own test: In order for a residential placement to be appropriate under the IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education. If the placement meets the test, then the court must examine each constituent part of the placement to weed out inappropriate treatments from appropriate (and therefore reimbursable ones). Those that are appropriate are ones that fit the definition of a related service: a service needed to allow the child to benefit from the education.

- **Hearing Officers**


  A hearing officer who formerly worked with the school district’s attorney and currently worked with the wife of the school district attorney was not, *per se*, biased. Due process considerations did not require the hearing officer to disclose these working relationships.
## 2011 Special Education Hearing Officers and Mediator Training
San Diego, California

### Schedule

<table>
<thead>
<tr>
<th>Day/Date</th>
<th>Time (each session will have a 15 min. break)</th>
<th>Speaker/Affiliation</th>
<th>Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monday March 21</td>
<td>1:00 - 4:30 pm</td>
<td>Jerome M. Sattler, Emeritus Professor, Department of Psychology, San Diego University</td>
<td>Bullying And Students with Disabilities</td>
</tr>
<tr>
<td>Tuesday March 22</td>
<td>9:00 am - Noon</td>
<td>Mary Schwartz, Impartial Hearing Officer, Illinois</td>
<td>The Nexus Between the DSM &amp; IDEA: Social Maladjustment v. Emotional Disturbance</td>
</tr>
<tr>
<td></td>
<td>1:30 - 4:30 pm</td>
<td>Prof. Elizabeth A. Francis, Judicial Studies and English, University of Nevada-Reno</td>
<td>How to Write Better Decisions</td>
</tr>
<tr>
<td>Wednesday, March 23</td>
<td>9:00 am - Noon</td>
<td>Prof. Philip T. K. Daniel, Professor Educational Administration and Adjunct Professor of Law, Ohio State University</td>
<td>The Role of ALJs in Special Education Hearings</td>
</tr>
<tr>
<td></td>
<td>1:30 - 4:30 pm</td>
<td>Lynwood (Lyn) E. Beekman, former Chief Administrative Law Judge, District of Columbia</td>
<td>Considerations for Better Management of Your Hearings</td>
</tr>
<tr>
<td>Thursday, March 24</td>
<td>9:00 am - Noon</td>
<td>Alice K. Nelson, Senior Attorney, Southern Legal Counsel</td>
<td>Compensatory Education: Where Are We?</td>
</tr>
<tr>
<td></td>
<td>1:30 - 4:30 pm</td>
<td>Prof. Mary B. Culbert, Loyola Law School Center for Conflict Resolution</td>
<td>Mediation of Special Education Disputes</td>
</tr>
<tr>
<td>Friday, March 25</td>
<td>9:00 am - Noon</td>
<td>Prof. Jane Wettach, Director, Children’s Education Law Clinic, Duke University Law School</td>
<td>Review of Recent Litigation</td>
</tr>
</tbody>
</table>