

The Wisconsin Special Education Mediation System

**Mediation Manual: Preparing for
Effective Participation in the Special
Education Mediation Process**

A Guide for Educators



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Preface

This manual is designed to help you learn about the mediation process and plan for your participation in a mediation session. Using the manual as a preparation tool gives you a better chance to participate more effectively in the mediation session. The manual is designed to help you:

- Anticipate issues you may need to consider before, during, and after mediation.
- Clarify your thinking.
- Think of new ways to resolve your dispute.
- Explain your point of view.
- Understand how the Wisconsin Special Education Mediation System (WSEMS) works.

The manual does not provide answers to legal questions that you may have about mediation or the topics you may discuss in mediation. Consult an attorney for answers to those questions.

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An Introduction to the Special Education Mediation Process

What is mediation?

Mediation is a voluntary process that allows parents and school districts to informally work out differences that they have about a child's special education needs with the help of a neutral third person, a mediator.

You (the parent and the school district) are active participants in every step of the mediation process.

Why should parents and school districts choose mediation?

1. **State Pays Cost of Mediation.** The special education mediation option is FREE to both parents and schools and is paid for by a grant from the state. On the other hand, the estimated average cost of a due process hearing (an alternative system to resolve similar disputes in which both parties, who attorneys may represent, argue their case before a hearing officer) is about \$40,000 to the local school district.
2. **Speedy Process.** Unlike the due process hearing timeline that may extend over the course of many months and beyond, the mediation process may be completed within 20 to 30 days. The mediation process can be most effective in the early stages of a dispute before emotions harden on both sides.
3. **Collaborative Process.** A parent and a school administrator remarked in disbelief to each other after their mediation session was over, "People were leaving the mediation session actually smiling at each other..." Since the mediation agreement is not imposed by a third party and is a result of the two parties crafting a joint resolution with the mediator's assistance, it is a win-win situation. Most importantly, parents and schools who experience collaboration in the mediation session tend to use the new collaborative framework to address and resolve future disputes.
4. **Forward Looking.** Unlike the due process hearing, the mediation option does not look to the past and search for "whom to blame." Instead, the mediation

option looks into the future in terms of (1) identifying the child's needs, (2) meeting the child's needs, and (3) meeting these needs in the future. Consequently, the resulting non-adversarial atmosphere at the mediation session is one of "let's roll up our sleeves and get to work" in order to establish a plan for the future.

- 5. Private/Confidential.** Mediation is private and confidential and provides a "safe haven" atmosphere for parties to openly discuss any issue, knowing it will remain private. No records are kept or shared in any subsequent legal proceeding. "...the mediator, the parties, and their attorneys agree that they are all strictly prohibited from revealing to anyone, including a judge, administrative hearing officer, or arbitrator, the content of any discussions which take place during the mediation process." (The Senate version of IDEA 97). According to state law (Wisconsin Statutes 904.085), the agreement to mediate is a contract between the parties agreeing to the confidentiality of the process so that offers and conversations cannot be shared in a future legal proceeding.

Because mediation is private, the names of parents and schools requesting mediation are kept in the confidential case file in the Wisconsin Special Education Mediation Office (WSEMS) and only shared with the mediator by the system intake coordinator.

- 6. Party-Driven.** Parties are actively involved in the process. The mediation process unfolds to the "tune" of the parties. The parties determine who the participants are, who will mediate, where the mediation session will occur, and what should be included in the final agreement. Thus, the mutually agreed upon resolutions will be more likely implemented and followed by the two parties over time. In addition, any party may stop the process at any time. The mediation option is designed to empower the parties.
- 7. Creative Solutions.** This process allows parties to suggest many different ways to resolve their issues. With the parties contributing to the resolution/agreement, they will feel as if the final agreement fits their needs, creating a win-win situation. No one party should feel like they have given up everything in the negotiation. The adversarial due process provision narrows

the decisions that can be made in such a process: one side is declared a “winner”, and the other side is declared a “loser.” The loser might need to provide certain services or remedies as determined by the hearing officer.

When is mediation right for you?

Mediation can be most effective when used early in a dispute. Mediation is a good process to use when there is:

- a need to preserve a good working relationship over a long period of time.
- a need for creative and flexible solutions, or “thinking outside of the box.”
- a need for privacy.

Under federal and state special education law, mediation may be used for disputes involving children with disabilities related to the following:

- Identification (such as eligibility for special education services)
- Evaluation (such as the proposal or refusal to initiate or change an evaluation)
- Individualized education program (IEP)
- Placement (such as type or location of services)
- Free Appropriate Public Education – FAPE- (such as appropriateness of special education services).

Who pays for mediation?

Mediation is a free process for both parents and schools. WSEMS pays the mediators with grant funds from the Wisconsin Department of Public Instruction. However, participants in the system must pay for their own expenses, such as attorney or parent/family advocate fees.

How do I request mediation?

A parent, district, or both must fill out a Request for Mediation Form to request mediation. If there are any questions about mediation or if a form is needed, call the WSEMS intake coordinator at 888-298-3857 or check the forms section of the WSEMS website: www.wsems.us.

The WSEMS intake coordinator can help you fill out the request form. When your form is received in the WSEMS office, the intake coordinator will call you to let you know that it was received and to ask some screening questions.

When you request mediation, the WSEMS intake coordinator will assign you a case number.

How fast is a mediation session scheduled?

Mediation is scheduled within 21 days after the mediator is chosen unless both parties agree to a longer time frame. The time and date of the mediation session should be convenient for both parties. The average mediation is 4 hours.

What is the role of the mediator?

The mediator is a neutral person who assists the participants in trying to reach an agreement.

The mediator helps the participants:

- Understand how the mediation process works.
- Facilitate who will participate in the mediation session.
- Schedule the mediation session.
- Facilitate discussion with each other.
- Identify and try to resolve underlying interests (such as trust and communication breakdowns).
- Create and explore options (by brainstorming, building on what is already working, etc.)
- Help parties create a draft of their agreement if agreement is reached.

The mediator does not:

- Make decisions about the case, like a judge or a due process hearing officer.
- Provide legal advice to any participant.
- Actually write the agreement (although mediators may act as a "secretary" or "scrivener" to record the ideas of the participants and their attorneys or advocates in their own words).
- Sign the agreement.
- Enforce the agreement.

Who are the mediators?

There are usually 25 -30 active mediators on the WSEMS special education mediator roster. They come from many different professional backgrounds. Some are attorneys; others are psychologists or social workers. Some are former educators. They are all well-trained and each mediator has completed a

5-day training on special education mediation that is required by Wisconsin law. Each must attend one day of training sponsored by WSEMS every year to remain on the roster. The parties should think about what different qualities and experiences would be helpful in their particular situation.

When both parties agree to participate in mediation, WSEMS works with the parties to choose a mediator. The intake coordinator can give suggestions, matching the needs of your situation to the training, education, experience, mediation style, personality, and geographic location of a particular mediator. Either party can also request a specific mediator to be appointed. However, both parties must agree on the same mediator. You will receive an email or letter with biographical information about the mediator, or you can go to our website, www.wsems.us, to review their bios.

Check periodically with the WSEMS intake coordinator or on the WSEMS website for any mediators who are on the “Inactive” status.

A mediator not on the WSEMS roster could be used, but it would be at the parties' expense.

You have three days to let WSEMS know if any nominated mediator is acceptable or not. Both parties need to agree and feel comfortable with the mediator selected for their case. Mediation is a voluntary process. *You* are in control of every step of the mediation process.

Mediators use different styles to conduct a mediation session. Some mediators may contact participants before the mediation session by phone, in writing, or by email. Some mediators want information before the meeting (such as IEP records), and some do not. Mediators vary greatly in how they facilitate their mediation sessions. A mediator may ask for private meetings (caucuses) and/or may work with the parties in the same room during the mediation session.

What are you looking for in a mediator?

Section for School Representative

What Happens Before the Mediation Session?

First, describe what specific concerns you might have about the child's education programming or placement.

With whom have you discussed your concerns about the child?

What were the results of your contacts/discussion?

What other action has been taken to try and resolve the issue(s) before trying mediation? _____

You and the parents may decide together that a neutral person (a mediator) is needed to help resolve your issues. Or, just one of you may decide help is needed in the form of mediation.

Next, determine if your issues can be considered for mediation under state law.

Special education law allows mediation to be requested for unresolved issues relating to children with disabilities in areas of:

- Identification (such as eligibility for special education services)

- Evaluation (such as the proposal or refusal to initiate or change an evaluation)
- Individualized education program (IEP)
- Placement (such as type or location of services)
- Free appropriate public education (such as appropriateness of special education services).

Do any of the above describe your situation? Yes No.

If yes, which? _____

If you don't think any of these apply, you may call the WSEMS Intake Coordinator to check. WSEMS cannot mediate Section 504 or Regular Education cases.

Next, fill out a "Request for Special Education Mediation" form

To request mediation jointly (parent and district together), you and the parent must fill out and sign a Request for Mediation form and submit it. To request separately, fill out the Request for Mediation form, sign, and submit. If you have questions about mediation or need a form:

- Call the WSEMS intake coordinator at 888-298-3857
- Check the WSEMS website: www.wsems.us

Complete the Request Form (if filing a joint request)

Write the issues (that you listed above) that describe your situation in the box that says, "MEDIATION REQUEST." We request that WSEMS help us to select a WSEMS mediator who will convene a special education mediation session regarding the following unresolved issues" (list).

By law, mediation cannot deny or delay a due process hearing. Are there other methods of dispute resolution that you have started or are in the process of trying related to this case, such as a due process hearing request, IDEA complaint, litigation? Yes No.

If yes, which? _____

Start date? _____

Add any more information about the issues you listed above if you wish, but a lot of detail is not necessary.

Complete the Request (if filing an individual request)

For an individual request, only one party (either parent(s) or school representative) signs the form. The process does take a bit longer this way.

WSEMS notifies the other person identified on the request form. The WSEMS intake coordinator explains the mediation process and finds out if the non-requestor (which could be you if the parent was the one who requested mediation) would like to try mediation. The non-requester is not required by law to participate in mediation. The mediation process is voluntary. The non-requester has 5 business days to decide whether or not to participate.

To request mediation jointly, you and the parents will need to fill out a request for mediation form. If you have questions about mediation or need a form:

- Call the WSEMS intake coordinator at 888-298-3857
- Check the WSEMS website: www.wsems.us

Who may participate in mediation?

Wisconsin law provides that the parents (see Wisconsin Department of Public Instruction website for definition of parent) or an adult student or a guardian and two school district representatives may participate in mediation. With the consent of both the parents and the two school representatives, other people may attend the mediation.

Who will be the two school district representatives? _____

Who will speak on behalf of the school district? _____

Who will have the authority to commit to an agreement on behalf of the school district? _____

Please be aware that the mediator may ask the following questions:

- Are all participants familiar with the facts of the case? Have participants read the IEP or other documents, if appropriate? Reading the IEP may help you to use the mediation session more effectively.
- Have all participants met or observed the child? Yes No
- Have all participants met the child's parents/guardian? Yes No

Generally, school participants meet to share perspectives before going to a mediation session.

Have all participants met to generate options? Yes No

Do all the school representatives share the same view about the appropriate action for the child? _____

Are there any concerns related to the child's home life that should be discussed at the mediation session? _____

Do you want anyone else to participate in the mediation session?

Other people may participate, with permission from both parents and school representatives. (Please note that you will be responsible for all related fees.)

Would you like anyone to attend the mediation session with you (attorney, psychologist/psychiatrist, social worker, therapist, minister, priest, rabbi, doctor or other medical provider, etc.)?

Yes No. If yes, who? _____

Please notify the mediator or the intake coordinator. The intake coordinator tries to get an initial idea of whom the parties would like to bring. The mediator can also help the participants decide who else may be present at the session. The mediator will let the parents know who else they would like to have come to the session and why. The mediator will also let you know others the parents would like present in the session and why.

You may both agree to the participation of others. Or, either of you can say no to other participants.

If the parent says no to someone you have suggested as a participant, you can ask for a break during the mediation session to meet with the person(s) by phone or in person.

The majority of WSEMS mediation sessions have been held without attorneys or advocates. The rate of agreement is about the same with attorneys or advocates present as without. It is your decision whether you would like an attorney or advocate present at your mediation session.

Following the contact with your mediator or intake coordinator, note who will be participating in your mediation session.

Scheduling the mediation session

Mediation is scheduled within 21 days after the mediator is selected unless both parties agree to extend the time frame.

Is there a need for the mediation session to be scheduled quicker than within 21 days? (such as in the case of an expedited due process hearing.)

Yes No If yes, why? _____

Let the intake coordinator know that you need an expedited timeline.

The mediator will work with you and the parents to find a place for the mediation session where you both will feel comfortable. This might be in a public library, community center, school, school district office, attorney's office, or via Zoom.

Where are 3 places you would like to meet?

The time and date of the mediation session should be convenient for both parties. The mediator will also check with you and the school district to find the

time best for both of you.

What dates and times of day (allow 4-6 hours) in the next 30 days would work for your mediation session? _____, _____, _____.

Dress should be comfortable and casual.

Do you have any special needs for the mediation session, such as an accessible site? Yes No If yes, describe: _____

If a language interpreter is needed, WSEMS will provide one or more as needed. Please notify WSEMS as soon as you are aware that a language interpreter may be needed.

Do you have a recommendation as to who would be an appropriate language interpreter? If yes, who? _____

What information may be helpful for mediation?

Mediators have different styles they use to conduct a mediation session. Some mediators want information before, and some do not. This is something you can discuss with your mediator.

You can bring materials to the mediation session to help the other participants understand your viewpoint.

Are there any materials such as IEP documents, recent assessments, or other written, audio, or video information that you would like the mediator or the school representative(s) to look at before or during the mediation session?

Yes No If yes, describe: _____

Have you had any evaluation done by someone outside of the public school that you might like the mediator or the parents to look at before or during the mediation session? Yes No. If yes, describe: _____

Are there any legal proceedings waiting to be resolved with the child (like with the Juvenile Justice System)? Yes No

If so, what?

District considerations

Home and school are both very important in a child's life. Often, one has an effect on the other. Think about the answers to the following questions. You may decide to answer these questions only for your own understanding or you may decide to share these answers with your attorney or the mediator. Some issues are private and there is no need to discuss them with an advocate or attorney.

What Happens During a Typical Mediation Session?

A few comments about the proceedings:

- Everyone sits around a table or enters a Zoom meeting with the mediator in a relaxed, informal manner.
- The mediator explains the agreement to mediate and then asks the parties to sign it.
- The mediator explains the mediation process and the mediator's role.
- The mediator asks each participant to explain why he or she is at the mediation and what he or she may see as the issues to be discussed.
- The mediator may ask questions to clarify issues.
- The mediator helps participants brainstorm and create a list of options.
- The mediator helps participants talk about all of the options.
- There will be no audio, video, or written record of the session unless a

party has a documented disability that needs to have one of these as an accommodation.

- Anyone may ask the mediator for a break at any time, or the mediator may decide to call for a break.
- A mediation session may last from one to six hours. The parties are asked to agree to a general schedule before the session begins. Sometimes, more sessions are needed.
- The parents and school district representatives work together to write down how they have decided to resolve their dispute. They both sign this written statement, which is called the mediation agreement. A participant may have a lawyer review the agreement at his or her own cost.

Generally speaking, mediators will tend to use the five (5) principles of problem-solving negotiation in mediating your case. Here are a few examples (see the book Getting to Yes, Fisher & Ury, for more information):

The Five Principles of Problem-Solving Negotiation

Generally speaking, mediators will tend to use the five (5) principles of problem-solving negotiation in mediating your case. Here are a few examples (see the book Getting to Yes, Fisher & Ury, for more information):

1. Separate people from the problem.

For example, if you, as a school representative, believe a parent has been unreasonable, pushy, and rude to the staff, you should not discuss these personal feelings or attack the parents while exploring the subject of physical therapy.

If the parents believe the special education director has been rude, insensitive, or unavailable, they should not discuss these feelings or attack the special education director personally when asking for additional physical therapy sessions each week for their child.

People are not responsive to requests, nor will they actively listen to each other if they are the subject of name-calling or personal attacks. The goal of mediation is to solve problems together and find possible solutions to solve

the problem. If parties directly open hostility and anger at the other party, it is much less likely that they will be able to solve the problem.

If you need to express strong personal feelings about people or situations, you may wish to discuss these separately with the mediator and decide if it would be helpful or unproductive to share those feelings with the parents. You can also decide to deal with relationship issues at a separate time and place.

Visualize yourself as being on the same side of the table, working with the district to problem-solve resolutions rather than on opposite sides of the table arguing for a specific outcome.

Is there a person that you need to separate from the problem? If so, who?
Describe _____

2. Focus on interests, not positions.

A position is what you want. It is concrete, definable, and measurable. ("I think two hours of OT per week for the student is sufficient.") An interest is the feeling, drive, motivation, and/or belief that has created the position. ("I believe that two hours of OT services is sufficient because it more than meets our obligation under the law, and I am concerned that our OT personnel are very overworked. Giving additional services is not warranted and could set a bad precedent.")

Another example would be if you, as a school representative, insist on a child taking an earlier bus (position); you should explain this is because you have no adult to supervise the child while waiting for a later bus (interest).

If the parent insists on a child taking a later bus (position), they could explain that no one is home when the earlier bus is dropping the child off (interest).

If only positions are shared, then it is easy to become competitive. If parents and district share their underlying interests, there may be a way to solve the issue creatively.

What do you think your interests are? Please describe: _____

3. Invent options for mutual gain.

Neither party should present their “one and only” proposal. For example, as a parent, do not say, “The only acceptable resolution is to provide a full-time aide from the moment my child arrives at school to when she leaves the school grounds.” And a school representative should not rely simply on “school policy” to address a parent’s request but try to think of multiple ways to implement policy.

By expressing and understanding the underlying interests (see step 2 above), multiple options can be explored, and the parties will have the ability to be more creative.

For example, if a parent wants a full-time aide because the child has difficulty attending to tasks, possible solutions might be 1) change seating location so that the child is closer to the teacher, 2) provide technological assistance such as an iPad, etc. so that the child has multiple modalities for learning, 3) have a part-time aide during the student’s more difficult subjects but have another student be a seat “partner” during less difficult subjects, 4) provide a study cubicle so that the child has minimal distractions while completing assignments.

What are three options (ways) you can think of to resolve your situation?

#1. _____

#2. _____

#3. _____

4. Insist on using objective data.

As a parent or a school representative, for example, rather than insisting your “method” based on personal experience is the “best way” to meet a child’s needs, agree jointly that each come to the next session with an outline/study showing the latest methods/research on, for example, speech/language methodologies. Check websites on the Internet for national organizations that may lead you to appropriate publications.

What kind of objective data might be helpful to your case? Where will you find the data: _____

5. Know your BATNA (Best Alternative To a Negotiated Agreement).

School representatives should know before attending the session if they have authority to take the case to due process. They need to know if they have the support of the administration and school board. They also need to know the financial and possible emotional costs, time investment, and possible outcomes.

Similarly, parents should try to determine before attending a session whether they will hire an attorney and proceed to due process or file an IDEA complaint if the negotiation fails. They should also know the financial and possible emotional costs, time investment, and probable outcomes of that decision.

What do you think your alternatives may be if you do not reach agreement through mediation?

What is the BATNA (Best Alternative) in your case?

What is the WATNA (Worst Alternative) in your case?

What do you hope to see happen at the mediation session? (For example, improved communication, specific desired outcomes, negotiated results?)

The agreement

You and the parents may reach an agreement. The agreement will be in writing. You and the parents write down how you have decided to resolve your dispute. You can have an attorney, at your own cost, look at the written agreement before you and the parents sign it. If you sign it, you are agreeing to its terms.

The agreement should be very specific, like "Tom will receive Occupational Therapy (OT) services three times a week 45 minutes per session in the OT room at the school." Or "The pending due process hearing # 004-02 will be dismissed."

The Wisconsin Special Education Mediation System, as a neutral agency, does not enforce the agreement.

You are responsible for following the agreement. You can include options in an agreement to return to mediation if any party feels the agreement is not being followed or there is a disagreement about the provisions. You can choose to use the same mediator or agree on another mediator.

What Happens After the Mediation Process?

All participants are asked to complete a satisfaction survey about the mediation process is complete. The information is given anonymously, and the participants' names remain confidential. The survey helps WSEMS measure how the mediation process is working, and where we might need improvement. The feedback also provides information for mediator training.

Where Can I Find More Information about WSEMS, the Mediators, and the Forms I Need to Fill Out?

The Wisconsin Special Education Mediation System website is home to a wide array of information and resources related to Mediation and Facilitated IEP Process in Wisconsin. On the site, you may find biographies of each mediator, information about the various dispute resolution options offered for free in Wisconsin, downloadable forms you may need, and a wealth of other helpful information. You may visit the site at www.wsems.us.