CHAPTER 10

MEDIATION

INTRODUCTION

Mediation is one of three formal methods of resolving disputes in special education at the local level. Other methods are formal complaint, which is discussed in Chapter 11, and due process hearing, which is discussed in Chapter 12. To begin the process of mediation, both parties must agree to mediate. Either the parents or a school representative may suggest this option initially by asking the other party if they are willing to mediate the disputed issues. The cost of mediation is borne by the State; there are no costs to either the parents or the local school district.

The use of mediation can have the following benefits over a formal complaint or due process hearing:

- Mediation uses the strengths of both participants to solve problems.
- Because it is voluntary throughout the process, and because a mediator has no authority to order any particular resolution, mediation is a safe way for both parties to offer and consider alternatives.
- Mediation can be less antagonistic.
- Mediation is less time consuming.
- Mediation is less costly for both parties.
- If an agreement is reached, it is written and committed to by the parties, themselves, rather than ordered by a hearing officer or the Kansas State Department of Education.
- A negotiated agreement may help with future positive relationships.

Forms to request mediation should available in each school district. The building administrator, special education director, or the Mediation consultant at Special Education Services may be contacted for the forms. Sample forms can be found at http://www.ksde.org/Default.aspx?tabid=603.
Each of the following topics in the State mediation process is discussed within this chapter:

A. Mediation Process
B. Mediation Requests
C. Mediation Participants
D. Special Education Mediators
E. Mediation Results

A. MEDIATION PROCESS

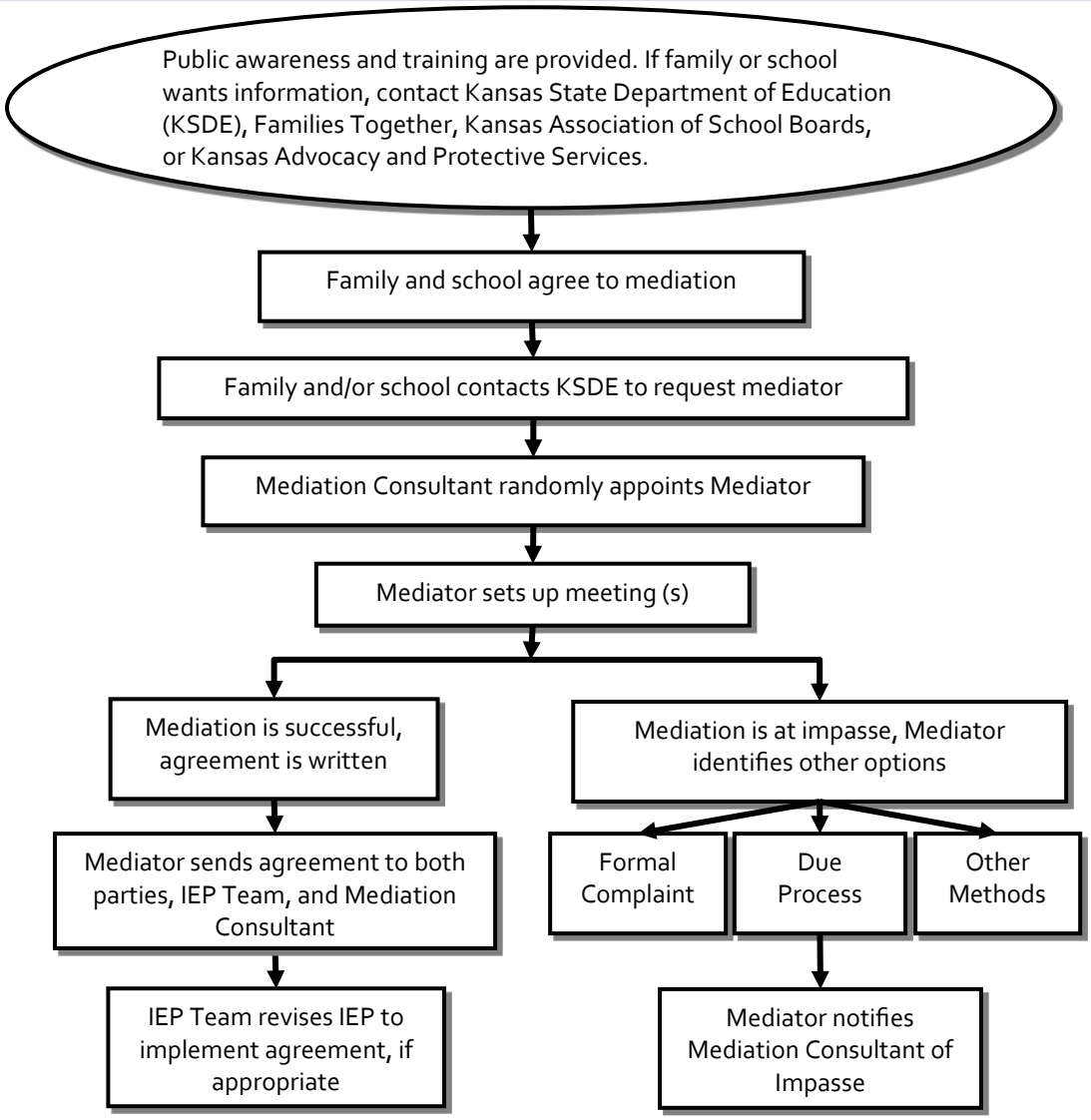
The Kansas State Department of Education (KSDE) has established mediation procedures to allow school districts and parents to resolve any matter regarding special education, including matters arising prior to the filing of a due process complaint. State statute, at K.S.A. 72-996, and State regulations at K.A.R. 91-40-28, and 91-40-29 set up the following provisions for special education mediation in Kansas:

- The mediation process is voluntary for both the parents and the school.
- Mediation may not be used to deny or delay a parent's right to a due process hearing, or any other parent right.
- Mediation is conducted by a qualified, impartial mediator who is trained in effective mediation techniques.
- KSDE maintains a list of qualified mediators and appoints the special education mediator.
- KSDE is responsible for the costs of mediation.
- Mediation must be provided in a timely manner and at a location that is convenient for both parties in the dispute.

- Agreements reached during mediation must be in writing and must include the resolution of each issue for which agreement was reached. Every mediation agreement must also include a statement that:
    - Discussions during mediation must be kept confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings;
    - Each party understands that the agreement is legally binding upon them; and
    - The agreement may be enforced in state or federal court.

The goal of the parties in mediation is to reach an agreement that is workable for all. If an agreement is reached it is put in written form by the mediator and signed by both parties. If issues prove to be irresolvable, the mediator will declare that an impasse has been reached and the mediation will be terminated. Below is a flow chart showing the steps involved in the mediation process.

SPECIAL EDUCATION MEDIATION PROCESS



B. MEDIATION REQUESTS

When parents or school personnel disagree about a special education issue, either party may request mediation. However, both parties must agree to use this process. Therefore, the first step in initiating a special education mediation is to ask the other party if it is willing to mediate the disputed issue. Mediation may be requested even if a due process hearing has been filed. This is one reason that the timeline for mediation is short. Mediation must be completed within the due process timeline, and mediation may not be used to delay the parents' right to due process. However, the due process hearing timeline may be extended by the due process hearing officer for a specific period of time during the mediation process if requested by the parties (34 C.F.R. 300.515(c)). Mediation is often viewed as a win-win situation, a positive process that may often avoid potential litigation. At a minimum, mediation must be available to resolve disputes relating to the following issues:

1. Identification,
2. Evaluation,
3. Placement, and
4. Provision of a free appropriate public education to the child.

Once both parties agree to mediation, they must complete and sign the three required forms, which are faxed and/or mailed to the mediation consultant at the Kansas State Department of Education (Early Childhood, Special Education, and Title Services, Landon State Office Building, 900 SW Jackson, Suite 620, Topeka, KS 66612); fax 785-291-3791).

(1) Agreement to Mediate: This one-page form indicates that both parties: (a) understand that mediation is voluntary; (b) agree to enter into mediation; (c) agree to abide by the procedures and guidelines for special education mediations; (d) agree not to record (electronically or otherwise) a mediation session; (e) agree that the mediator will not make decisions regarding the disputed issues; and (f) understand that agreements must be in writing and are legally binding and enforceable in a state or federal court. Each party must sign this agreement;

(2) Confidentiality Pledge: This one page form indicates that both parties: (a) understand and agree that discussions during mediation are confidential; (b) agree not to call the mediator or anyone associated with the mediator as a witness in any judicial, administrative or arbitration proceeding regarding the mediated dispute; (c) agree not to subpoena or demand the production of any records, notes, work product or other written information of the mediator; (d) agree that if a party does subpoena a mediator or a mediators records, the mediator will contest the subpoena and the requesting party agrees to reimburse the mediator for all expenses related to contesting the subpoena, including attorney fees plus the mediator's hourly rate; and

(3) Request for Mediation: This one-page form includes contact information for use by the mediator. The contact information consists of the name, address, and phone number of the parties, the name and birth date of the student and whether or not a due process hearing has also been requested. This form also asks the parties to agree on some preferred dates for which they are both available to mediate. If the parties list some preferred dates on this form, the KSDE will attempt to find a mediator who is available on one of those dates. The preferred dates should be at least seven to ten days after the date of the request for mediation so that the Kansas State Department of Education (KSDE) has time to appoint a mediator and allow the mediator to arrange for a mediation session. If a mediation session is needed more quickly, the parties may request an earlier date by telephone and send the mediation forms to the KSDE electronically. The KSDE will attempt to accommodate all requests.

When KSDE receives a request for a special education mediation, the mediation coordinator immediately appoints a mediator. The mediator notifies both parties and arranges for mediation. The location must be convenient to the parties and should be acceptable to everyone. A neutral location is preferred. If the mediator is not familiar with neutral locations in the area where the mediation will be, she/he will usually ask the school representative for suggestions (such as a room in a county courthouse or public library). In some cases where neutral sites are not readily available, mediations can be held on school property.

C. MEDIATION PARTICIPANTS

Mediation is an informal process that includes discussion of the issues and proposed resolutions. Generally, discussions include the mediator, the parents, and a school representative. The school representative is often not from the IEP Team, because this group has not been able to reach agreement. Mediation seems to be more successful if the school representative is someone else who is knowledgeable about the issues and has decision making authority.

Generally, the likelihood of reaching an agreement is enhanced by keeping the number of participants to a minimum. However, either the parents or the school representative may ask an outside advocate to attend. If the parents are not able to participate fully and need assistance (because of reasons such as not speaking English, having a disability themselves, or not fully understanding the issues or procedures), the parents may wish to have an advocate to assist them.

In Kansas, attorneys are allowed to participate in special education mediations. However, mediations generally prove to be more successful when the parties work on their own, without attorneys present. Ultimately, because mediation is a voluntary process, any party that objects to the presence of an attorney may withdraw from the mediation. If for some reason, attorneys or advocates become involved in a mediation session, the mediator will establish ground rules for the participation of advocates or attorneys, again in an effort to ensure that discussions are between the parties to the dispute.

D. SPECIAL EDUCATION MEDIATORS

In Kansas, in order to be considered trained and qualified, mediators must fulfill two requirements:

1. Demonstrate competency in special education law by successfully passing a written examination with at least 90 percent accuracy (a special education law class sponsored or approved by the state board is conducted periodically to help mediators with this requirement); and
2. Complete a program sponsored or approved by the state board concerning effective mediation techniques and procedures, and the role and responsibilities of a mediator (K.A.R. 91-40-29(a)).

After initially qualifying as a mediator, Kansas requires that to remain eligible, special education mediators must have continuing education program in special education law conducted or approved by KSDE (K.A.R. 91-40-29(c)).

Employees of KSDE, local schools or other education agencies, or school boards may not serve as a mediator for special education disputes in the State of Kansas. Others who have a real or perceived conflict of interest may also not serve as special education mediators. Only the Kansas State Department of Education may appoint special education mediators.

E. MEDIATION RESULTS

During mediation, the mediator will work with both parties to reach an agreement. If mediation discussions result in both parties' reaching agreement, the mediator records the results in a written mediation agreement, which is signed by both parties. When the issues in mediation involve IEP decisions, the mediation agreement may become part of the student's IEP if agreed to by the parties. It is not necessary for the IEP team to meet because the decisions are enforceable and have been made during the mediation with the responsible parties involved (the parents and the school representative). The actions agreed upon in the mediation should be implemented immediately, unless the mediation agreement specifies otherwise.

If the IEP is changed by adding the mediation agreement, the IEP team may write a new IEP or amend the existing IEP to reflect the mediation agreement. The school is responsible for following up with the required notice and consent forms. The revised IEP is then implemented. If the mediation agreement is not part of the IEP the school must ensure that any person responsible for implementing the agreement is informed of their responsibilities.

However, if the mediation is not successful, the mediator may declare that the mediation is at impasse and suggest that both parties consider other methods for dispute resolution, such as Formal Complaint (Chapter 11) and/or Due Process (Chapter 12).

K.S.A. 72-996

(a) The state board shall establish and implement procedures to allow agencies and parents to resolve disputes through a mediation process which, at a minimum, shall be available whenever a due process hearing is requested under this act.

(b) The procedures adopted shall ensure that the mediation process is:

(1) Voluntary on the part of the parties;

(2) Not used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under this act; and

(3) Conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(c) The state board shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services and shall establish procedures for the appointment of a mediator to help resolve disputes between the parties.

(d) The state board shall bear the cost of the mediation process described in subsection (c).

(e) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(f) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(g) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process

K.A.R. 91-40-28. Special education mediation and due process hearings.

(a) If a disagreement arises between a parent and an agency concerning the identification, evaluation, or educational placement of the parent's exceptional child, or the provision of FAPE to the child, the parent or the agency, or both, may request mediation or initiate a due process hearing.

(b) (1) If mediation is requested by either party, the provisions of K.S.A. 72-996 and amendments thereto shall be followed, together with the requirement in paragraph (2) of this subsection.

(2) When agreement is reached to mediate, the agency shall immediately contact the state board or its designee. A mediator shall be appointed by the state board from its list of qualified mediators, based upon a random or other impartial basis.

(c) If a disagreement as described in subsection (a) arises, the parent or the agency, or both, may initiate a special education due process hearing by filing a due process complaint notice. Each due process hearing shall be provided for by the agency directly responsible for the education of the child.

(d) (1) If a special education due process complaint notice is filed, the provisions of K.S.A. 72-972a through 72-975 and amendments thereto shall be followed, together with the requirements in this subsection.

(2) Not more than five business days after a due process complaint notice is received, the agency providing for the hearing shall furnish to the parent the following information:

(A) The agency's list of qualified due process hearing officers;

(B) written notification that the parent has the right to disqualify any or all of the hearing officers on the agency's list and to request that the state board appoint the hearing officer; and

(C) written notification that the parent has the right, within five days after the parent receives the list, to advise the agency of any hearing officer or officers that the parent chooses to disqualify.

(3) (A) If a parent chooses to disqualify any or all of the agency's hearing officers, the parent, within five days of receiving the list, shall notify the agency of the officer or officers disqualified by the parent.

(B) An agency may appoint from its list any hearing officer who has not been disqualified by the parent.

(4) Not more than three business days after being notified that a parent has disqualified all of the hearing officers on its list, an agency shall contact the state board and request the state board to appoint a hearing officer. In making this request, the agency shall advise the state board of the following information:

(A) The name and address of the parent;

(B) the name and address of the attorney, if any, representing the parent, if known to the agency; and

(C) the names of the agency's hearing officers who were disqualified by the parent.

(5) Within three business days of receiving a request to appoint a hearing officer, the parent and agency shall be provided written notice by the state board of the hearing officer appointed by the state board.

(e) If a due process hearing is requested by a parent or an agency, the agency shall provide written notice to the state board of that action. The notice shall be provided within five business days of the date the due process hearing is requested.

(f) (1) Unless the agency and parent have agreed to waive a resolution meeting or to engage in mediation, the agency and parent shall participate in a resolution meeting as required by K.S.A. 72-973 and amendments thereto. The parent and agency shall determine which members of the IEP team will attend the meeting.

(2) If a parent who files a due process complaint fails to participate in a resolution meeting for which the agency has made reasonable efforts to give the parent notice, the timelines to complete the resolution process and begin the due process hearing shall be delayed until the parent attends a resolution meeting or the agency, at the end of the 30-day resolution period, requests the hearing officer to dismiss the due process complaint.

(3) If an agency fails to hold a resolution meeting within 15 days of receiving a due process complaint or to participate in a meeting, the parent may request the hearing officer to begin the due process hearing and commence the 45-day timeline for its completion.

(g) The 45-day timeline for completion of a due process hearing shall start on the day after one of the following events occurs:

(1) Both parties to the due process proceedings agree, in writing, to waive the resolution meeting.

(2) The parties participate in a resolution meeting or in mediation but agree, in writing, that resolution of their dispute is not possible by the end of the 30-day resolution period.
(3) Both parties agreed, in writing, to continue to engage in mediation beyond the end of the 30-day resolution period, but later one or both of the parties withdraw from the mediation process.

K.A.R. 91-40-29. Qualifications of special education mediators and due process hearing officers.

(a) To initially qualify as a special education mediator, a person shall meet the following requirements:
(1) Have passed a written examination prescribed by the state board concerning special education laws and regulations; and
(2) have completed a program sponsored or approved by the state board concerning effective mediation techniques and procedures, and the role and responsibilities of a mediator.

(b) (1) Except as otherwise provided in paragraph (2) of this subsection, to initially qualify as a special education due process hearing officer or review officer, a person shall meet the following requirements:
(A) Be a licensed attorney in good standing with the licensing agency in the state in which the person is licensed to practice law;
(B) have passed a written examination prescribed by the state board concerning special education laws and regulations;
(C) have completed a program sponsored or approved by the state board concerning due process hearing procedures and the role and responsibilities of a due process hearing officer; and
(D) have passed a written examination prescribed by the state board concerning due process proceedings.
(2) Each person who is on the list of qualified due process hearing officers maintained by the state board shall remain eligible to serve as a due process hearing officer or review officer, if the person the continuing education programs in special education law that are conducted or approved by the state board.

SUGGESTED MEDIATION PROCESS TIMELINE

(Calendar Days)

Timeline	Responsible Party	Action
Day 1	Family and School Mediation Consultant	Agree they want mediation, sign and forward required forms: *(Agreement to Mediate, Confidentiality Pledge and Request for Mediation)* remembering to include the preferred dates available for both parties. Send forms to KSDE Mediation Consultant KSDE Mediation Consultant receives forms.
By day 4 (within 3 business days of request)	Mediation Consultant	Randomly appoints a mediator and informs both parties of the appointment
By 7th business day (within 3 business days of appointment)	Mediator	Arrange mediation at a place and time acceptable to both parties
By day 17 (within 10 days of setting mediation meeting) This is suggested timeline. However, mediation should occur on one of the preferred dates of the parties.	Family, School, Mediator	Participate in and complete mediation process If successful, write agreement and fax or send to Mediation Consultant and IEP team NOTE: Timeline may be extended, if needed.
By day 19 (within 2 days of mediation conclusion)	Mediator	Send Mediation Status to Mediation Consultant

QUESTIONS AND ANSWERS ABOUT MEDIATION

1. How are mediators selected to conduct a special education mediation?

The mediation coordinator at the Kansas State Department of Education chooses a mediator on a random basis from a list of trained and qualified mediators. Mediators will have successfully completed a training program designed for special education mediators.

2. What are the qualifications of a special education mediator?

The mediator will:

- Have received formal training in the mediation process and in Federal and State laws and regulations regarding special education;
- Be on an approved list of qualified mediators at KSDE;
- Have no personal or professional interest that would conflict with his/her objectivity;
- Have no prior involvement in any decisions regarding the student's identification, evaluation, special education program, or educational placement;
- Be professional, impartial; and
- Be able to complete the required duties and responsibilities.

3. What is the role of the mediator?

The mediator helps the parents and school representative clarify issues in disagreement and find solutions that satisfy both parties. The mediator serves as:

- **Convener**--by contacting the parties to arrange for the mediation.
- **Educator**--by informing the parties about the mediation process and other conflict resolution procedures including due process hearings.
- **Communicator and Facilitator**--by using strategies to be certain that each party is fully heard in the mediation.
- **Translator**--by replacing or reframing communication so that both parties are understood and received.
- **Questioner and Clarifier**--by probing issues and confirming understandings.
- **Process Advisor**--by suggesting procedures for making progress in mediation including caucus meetings and consultations with others.
- **Catalyst**--by offering options for consideration, stimulating new perspectives, and offering ideas for consideration.
- **Closer**--by reducing the agreement to writing and obtaining signatures of both parties.

4. How long does mediation take?

Many mediation sessions have been successfully completed in half a day. The mediator will determine whether progress is being made or whether additional time is needed for resolution.

5. Is special education mediation binding?

If both parties sign the mediation agreement, it is binding on both parties, and is enforceable in a State or Federal court. The rules of mediation state that the success of the written agreement depends on good faith efforts of both parties.

6. When can mediation be requested?

Mediation can be requested when it is believed that an impasse has been reached at the local level on any matter involving the identification, evaluation, placement, or the provision of a free appropriate public education to the child. Either the parents or the school representative should discuss with the other party if mediation is an option, and should ask for mediation as early as possible. Mediation can occur before or after a special education due process hearing has been requested or when a hearing concerning an interim alternative educational placement is being considered. Mediation cannot be used to deny or delay an impartial special education due process hearing once it has been requested.

7. Who should I call for information or to request mediation?

Information or forms may be requested from a building administrator, special education director, Families Together (800-264-6343), or The Disability Rights Center of Kansas (785-273-9661). You may also contact the mediation coordinator on the Special Education Services Team of the Kansas State Department of Education.

Address: Kansas State Department of Education, Early Childhood, Special Education, and Title Services, Landon State Office Building, 900 SW Jackson, Suite 620, Topeka, KS 66612
Phone: 800-203-9462 or 785-296-7454
Fax: 785-291-3791
Email: mward@ksde.org

8. How soon is mediation scheduled after the parties request it?

A mediation conference should be scheduled as soon as possible after receiving a request for a mediation conference. Some flexibility is permitted to accommodate availability of both parties. The meeting must be in a place that is convenient for both parties. On the Mediation Request Form, the parties should request specific dates and times when both parties are available. This should allow a reasonable period of time for the selection of a mediator and for the mediator to set up a mediation session. Two weeks is usually enough time to accommodate such a request. One of the reasons time is so critical is that mediation may be requested even if a special education due process hearing has been filed, but the mediation process may not delay the parents' right to due process.

9. Who pays for mediation?

The fee and expenses for the mediator, if any, are paid by Special Education Services at the Kansas State Department of Education. Mediation is available at no cost to the school or the parents.