Laws Applicable to Mediation Confidentiality In Special Education Disputes

One reason that mediation is so effective as a means of resolving disputes is the promise of confidentiality for information communicated during the mediation process. Mediation confidentiality allows the parties to speak candidly and honestly about their concerns, and to openly brainstorm various possible ways of resolving the dispute. They know that, for the most part, "what is said in the room will stay in the room."

Both federal and Oregon law pertain to the confidentiality of communications made during special education mediations.

Federal Law:

The Individuals with Disabilities Education Act (IDEA) requires states to offer mediation at least whenever a due process hearing is requested. See 20 USC 1415(e). The statute and its implementing regulation 34 CFR 300.506 provide that *"An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement."* 300.506(b)(5). Furthermore, *"Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings."* 300.506(b)(6).

Another federal education law, the Family Educational Rights and Privacy Act (FERPA), governs access to educational records. Its implementing regulations are at 34 CFR 99. FERPA limits who has access to educational records. If the mediation results in a written mediated agreement, ODE interprets that document to be an educational record under FERPA. Therefore the written mediated agreement would normally become part of the student's educational file, to which ODE has access. The parties to the mediation may seek to agree that the copy of the agreement provided to ODE should have personally identifiable information (such as the student's and parents' names and addresses) deleted.

Oregon receives money under the federal Child Abuse Treatment and Prevention Act (PL 104-235, as amended 1996), 42 USC 5101 and 5116, which requires states to create mandatory child abuse reporting systems. Often some of the participants in special education mediations are mandatory abuse reporters (such as teachers, social workers and attorneys), who need to reconcile mediation confidentiality with abuse reporting obligations.

State Law:

General provisions about mediation confidentiality are set forth in Oregon Revised Statutes Chapter 36. Mediation communications are confidential and may not be disclosed, unless the parties agree in writing as to what is not confidential, or another exception exists. See ORS 36.220 to 36.232. "Mediation communications" means all communications made to, and all documents prepared for or submitted by, the mediator, party, or participants in the course of the mediation process. The mediation process includes all contacts among the mediator, parties and parties' agents (such as employees or attorneys) until resolution is reached or the process is terminated. See ORS 36.110. The practice of most mediators is to

keep confidential even the initial inquiries they receive as to whether a particular dispute is appropriate for mediation, and their pre-session caucuses with the parties.

ODE has adopted an administrative rule concerning mediation in special education cases. See OAR 518-015-0095. Like the IDEA regulation, OAR 518-015-0095(6) makes mediation discussions confidential. However, it creates a limited exception for mandatory abuse reporting. OAR 518-015-0095(7) provides that *"a mediation communication relating to abuse is not confidential to the extent that the participant in the mediation to whom the communication is made is required to report the communication under state abuse reporting laws."* This is also consistent with an exception to mediation confidentiality made by the general statute ORS 36.220(5).

Oregon's mandatory abuse reporting statutes have evolved over time, and are subject to changes in the future. At this time the key reporting obligations, which might become pertinent to special education mediation communications are:

1. Child Abuse: ORS 419B.005 et seq.
2. Elder Abuse: ORS 124.050 et seq.
3. Abuse of Adults with Mental Illness or Developmental Disabilities receiving services from a community program or facility: ORS 430.735 et seq.

Only the mandated reporter may disclose the communication, not other participants in the mediation. Presumably, this is because the mandated reporter will be aware of his/her responsibilities, has received training, and can make a judgment call as to whether to report the particular communication given the circumstances.

In most special education mediations, the parties are the parents, student, and local school district; ODE's role may be to provide information about mediation, assist the parties to select an independent mediator, or pay for the mediation if a due process hearing has been requested. However, in some disputes ODE may actually be one of the parties, for example if the student is served by an EI/ECSE provider under contract with ODE, or by a state school such as the Oregon School for the Deaf. And there may be some disputes between other parties to which ODE staff would be assigned as the mediator. Therefore, ODE has adopted OAR 581-001-0110, based on the Oregon Attorney General's Model Rule on confidentiality in mediations to which state agencies are parties or are mediating disputes as to which the agency has regulatory authority. OAR 581-001-0110 more specifically defines what is confidential or not. Key exceptions detailed in section (9) include: mandatory abuse reporting, disclosure of threats of physical harm, and reporting of professional conduct related to licensure. This rule also requires the parties to complete a written Agreement to Mediate. The reason for stricter regulation of mediation confidentiality when ODE is a party or mediator is because government activities are normally open to the public under public records and open meeting laws.

Remedies for a Threatened or Actual Breach of Mediation Confidentiality:

Mediators, as well as parties, promise to protect confidentiality. State law grants mediators good faith immunity. It protects mediators from civil liability for disclosure of confidential mediation communication "unless the disclosure was made in bad faith, with

malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another." ORS 36.210(2).

The parties may be worried that a party might disclose confidential mediation communications. Depending on the circumstances, under Oregon's contract or tort law the remedies for disclosing confidential mediation communications might include: exclusion of the communication as evidence in a subsequent proceeding; an injunction to prevent disclosure; a breach of contract action seeking liability for all damages, fees and costs; or a tort action for intentional infliction of emotional distress, also seeking damages. Other remedies might be available as well. The parties could minimize the risk of disclosures and the uncertainty of what would happen, by including in their mediated agreement a term detailing what the remedy would be (such as a liquidated damage payment, or a particular action taken).