



The Involvement of Students in Their Special Education Mediations

A briefing paper for
THE CONSORTIUM FOR
APPROPRIATE DISPUTE RESOLUTION
IN SPECIAL EDUCATION (CADRE)

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October, 2003

CADRE is funded by



ACKNOWLEDGEMENTS

The authors wish to thank Philip Moses, John Reiman, and Richard Zeller for significant contributions to the writing of this paper, Lynne Rossi and Aimee Taylor for editing, and Tom Kelly for graphic design and layout.

We also wish to acknowledge Peggy Cvach, CADRE's Project Officer, for her support. We appreciate the following individuals for the contribution of their perspectives to this paper: state mediation coordinators Dee Ann Wilson, Doris McQuiddy, Art Stewart, and Laura Bassein; Michigan mediator Dorothy Mason; and students Kayla Sweeney and Holly Tucker.

INTRODUCTION

Little, if anything, has been written about how to determine when student participation in special education mediations might be appropriate. What possibilities exist for the role of the student in a mediation regarding the services that she receives? How does such participation impact the student? When students with disabilities do participate in special education mediation, how do we best accomplish their inclusion? This paper identifies some of the benefits and challenges that warrant consideration by families, educators, and dispute resolution practitioners as they create opportunities for students to participate in the mediation process. Perspectives and assumptions regarding student participation are captured and strategies are presented that may contribute to an improved process for all involved. While acknowledging potential challenges, we propose that students should participate as fully as possible in mediations regarding the educational services they receive. Given the variability in participants, processes, and practitioners, this discussion serves as an introduction to the complexities and nuances raised by the involvement of students in their mediations.

The Individuals with Disabilities Act, as amended in 1997 (IDEA '97), requires that states offer mediation whenever a due process hearing is requested to resolve disagreements about the educational program for a student with special needs (20 U.S.C. §1415(e)). In addition, many states offer mediation without a request for a due process hearing (National Association of State Directors of Special Education, 2003).

IDEA mandates that schools begin transition planning for adolescents with disabilities at age 14 (they may start at a younger age, if appropriate) and that they begin providing transition-related services no later than age 16 (34 C.F.R. §300.344(b) (1) and §300.347(b) (1)). Students over 14 are often included in Individualized Education Program (IEP) meetings, and students over 16 are considered essential participants in meetings to design their educational programs (National Council on Disability, 2002).

In interpreting IDEA '97 requirements, the Office of Special Education Programs (OSEP) advises that students are appropriate participants in their special education mediations. "Because transition planning and transition services are designed to take into account the student's preferences and interests, it is appropriate for a student with a disability receiving these services to attend and participate in the mediation process" (Warlick, 2000).

The search for information on student participation in special education mediations led the authors to two other areas of student involvement: peer mediation and student-led Individualized Education Programs. Conderman, Ikan, and Hatcher (2000) discuss the advantages of student-led conferences for students with and without disabilities and their families, focusing on increased student involvement, student goal-setting, student reflection, and student responsibility. The authors describe the steps and the positive results in a school district that has adopted the student-led conference approach for all students. McGahee, Mason, Wallace, and Jones (2001) have published a guide to help teachers as they plan for and implement student-led IEPs. Activities are offered for helping secondary students develop and participate in their IEPs.

Peer mediation programs boast a relatively long history of involving students. These programs seek to change the way students understand and resolve conflict in their lives, with reported changes in students including improved self-esteem, listening skills, and critical thinking skills (Terry-Day & Gerber, 1997). School-based peer mediation programs benefit the general student body, the families of students, and society at large. The student body benefits as students assume greater responsibility for solving their own problems. The process encourages students to share their feelings and search for positive ways to meet their needs. The problem solving process also carries over to families. Both parents and students have reported that conflicts at home have been resolved more effectively as a result of the programs. Society benefits because students who learn to resolve conflicts positively are likely to do the same as they become adults. Finally, businesses may benefit because students have productive workplace skills.

The ADA Mediation Guidelines (2000) were designed to address the accommodation of adults with disabilities in mediation generally. Many of the provisions are also relevant to the inclusion of students with disabilities in their special education mediations. For example, access to process and capacity to participate are capably addressed. Readers are strongly encouraged to review the Guidelines, as they are an excellent source of information on many of the topics this paper addresses.

Special education mediations typically include parents and educators; sometimes include advocates or attorneys, related services providers, and administrators; and less frequently include the students themselves. A range of abilities and capacities to effectively engage in the mediation process must be considered for all participants, and particularly when gauging the appropriateness and potential for student participation. Any one participant's capacity for participation has a ripple effect on all participants. Since mediation is a problem-solving process that relies heavily on verbal skills, individuals who are inhibited or uncomfortable speaking in groups may need extra assistance to participate optimally. In addition, mediation is based on assumptions about conflict and its resolution that are not universally shared across ethnic, linguistic, and socio-economic groups. Some cultural groups, for instance, may believe that it is inappropriate for children and youth, or even parents, to be engaged in the process of making decisions about educational programs. Because differences in culture, language, and educational background impact both the process and participation, adjustments and accommodations may need to be made to make mediation a more useful process for all.

BENEFITS OF STUDENT PARTICIPATION

The potential benefits associated with student participation in special education mediation include the empowerment of the student; the fostering of improved relationships among those involved in the mediation; and the creation of more durable and comprehensive mediated agreements. Below are some of the positive effects that may result from student involvement.

Students learn critical conflict resolution and negotiation skills, develop an appreciation for the value of resolving disputes in an effective manner, and acquire the ability to recognize and respect different perspectives. Appropriate dispute resolution is a life skill that is applicable in a variety of personal and professional settings. This skill helps students to competently navigate their lives and to maintain key relationships. During mediations, students participate in and observe adults engaging in collaborative problem solving, which may be a new experience for those who are accustomed to the use of aggression, demands, or arguments, or, at the other extreme, passivity and accommodation for getting along. The structure of the mediation process encourages participants to listen to other perspectives on issues and other perceptions of events. While agreement is not required, acknowledging that others have opinions that may differ from one's own is a fundamental premise of the mediation process.

Students enhance their oral presentation and communication skills. Participation in the mediation process allows the opportunity for youth to more effectively articulate and assert their needs and goals. Kayla Sweeney (personal communication, July 25, 2002), an Oregon high school student who was interviewed for this paper regarding IEP meetings, considered it crucial to honor the student's ability to ask for services. She views students' participation in their meetings as a learning opportunity regardless of how smoothly it is carried out. Holly Tucker (personal communication, July 20, 2002), a high school student from Virginia who currently runs her own IEP meetings, was asked if at any stage she would have done things differently. She responded that, if asked, she would have shared her perspective earlier in her educational career.

Students learn about issues of confidentiality and privacy. Mediators clarify with all participants the confidentiality of mediation discussions. Trust in the commitment of others to maintain one's confidences creates a safe environment for parents and educators to discuss sensitive issues, emotionally charged concerns, and strongly held beliefs. Mediation may thus provide a key setting for students to learn the importance of confidentiality and the role of privacy in demonstrating respect for others.

Students improve leadership skills as they develop an understanding of the link between their needs and the services provided, and as they make a difference in the outcome of discussions about their educational programs. Involving students in discussions of their strengths and limitations fosters their increased understanding of what related services are needed and provided. Encouraging students to question their options further augments that understanding. Involving students in identifying modifications to the services they receive reinforces experiences of success and self-determination. Their role, as an integral and productive part of the process, can serve as an empowering growth experience that students will carry with them into the future.

The presence of students helps maintain the focus of the mediation on their needs and encourages positive, strength-based discussions. Mediations can become highly charged, emotional, or even heated. The discussion has the potential to stray from the student's needs while participants become more attached to maintaining a position. A student's presence can serve to refocus the discussion on the student's best interest and assist in keeping problem-solving efforts intact. Adults may speak more carefully when expressing disagreements and concerns in order to model behavior that they want students to emulate.

Student participation has the potential to improve or create relationships that otherwise may not have been forged. In some mediations, the individual representing the school district may not actually know the student. A student directly expressing her thoughts and opinions can connect with an educator or administrator on a more personal level. Student participation can also shift student/parent relationships as parents see their child in a different light.

Students are key stakeholders and essential to creating an effective agreement.

A special education mediation conducted without the student present would seem to lack an indispensable participant. Any agreement reached without the student's input and assent risks non-cooperation by the student. If implementation of the agreement requires the student to take an active role, the student's participation and agreement may ensure a more effective and durable agreement. The earlier the involvement of the student in any capacity, the more empowered the student becomes. With some older students, participation in mediation recognizes a shift from the parents to the student as the appropriate decision-maker.

These are a few examples of the benefits to be gained by including students in their special education mediations. In many cases, these benefits far outweigh the thought, planning, and challenges of including the student in the process.

CONSIDERATIONS FOR INVOLVING THE STUDENT

The mediation process, unlike litigation, allows for tremendous flexibility in accommodating a variety of participant needs. Varying the timing, setting, and degree of involvement creates a number of opportunities for students to participate in their special education mediations. Student participation can range from being present and fully participating to having his perspective represented instead of attending.

Thoughtful planning and appropriate accommodation before, during, and after a special education mediation will help ensure successful participation and integration of the student. The following are a number of strategies for mediators and others to consider using when facilitating or participating in a mediation with a student participant.

Pre-mediation

Some, but not all, mediators and mediation programs use a process known as "case development" to help people understand the mediation process and prepare for effective participation. Mediations including students especially benefit from case development work. A skilled case developer lays the groundwork for success in the process and can contribute significantly to appropriate decisions about student involvement.

Whether the questions are asked by a case developer or the mediator, pre-mediation is the most appropriate time to begin to explore the questions of whether and how to include the student in the process. For an example of one approach to case development and questions relevant to the preparation for any mediation, see Appendix A.

Areas to explore that relate specifically to involving the student include:

1. The student's ability to participate in the mediation process:
 - Ability to understand the process (cognitive functioning),
 - Ability to conduct him/herself appropriately in the process (behavioral functioning),
 - Emotional maturity, and
 - Accommodation needs (access, interpreting, etc.);
2. The history of the student's involvement in his IEP meetings;
3. The student's inclination and willingness to participate;
4. Parents' and educators' concerns about the student's involvement;
5. Family cultural values regarding the appropriateness of youth playing an active role in decision-making; and
6. Disagreements between the student and the parents.

A case developer may speak to each potential participant or only to key stakeholders. If a student may participate, a case developer or mediator should speak to the student to address these issues directly and to educate the student about the process, goals, and requirements of participation. Decisions made during pre-mediation planning can create a more productive environment for mediation participants. Factors to consider include scheduling at a convenient time of day, meeting in a neutral location, identifying potential distractions such as light and sound, and addressing other needs of the participants. For the student, the presence of a "safe" person may affect their willingness or ability to speak up, as might the absence of certain individuals whom the student perceives as threatening. When the participants anticipate that the mediation will last more than a few hours, multiple shorter sessions may prove more tolerable and help to create success for both the student and the adults. For more information on making the process accessible to Deaf students, the reader is referred to "Considerations for Mediating with People who are Culturally Deaf" (Leonard, Duren, & Reiman, 2002).

When the student cannot be physically present at the mediation table, the student's perspective may still be presented. A written or audio-recorded statement can convey the student's opinion. Alternately, a designated advocate (who might be selected by the student) may represent the student in the mediation. The student, the representative, and possibly a case developer might meet beforehand to discuss the student's needs, interests, and opinions to ensure accurate and meaningful representation. This would also be an opportunity to prepare the representative for the mediation process. A skilled case developer can often identify challenges associated with student participation during the pre-mediation stage of the process. Addressing solutions early can preempt problems that might otherwise occur later in the face-to-face meeting.

Mediation:

During the initial phase of the face-to-face meeting, the mediator will include the student, to the extent possible and appropriate, in the discussions and agreements. The mediator's job is to:

- (a) help participants articulate guidelines for their conduct during the mediation;
- (b) guide a discussion that results in an agreement about the confidentiality of mediation conversations;
- (c) help participants create an agenda of the issues to be discussed; and
- (d) watch for and address any imbalance in the ability of those present to participate effectively in the process.

Articulating guidelines for conduct during the mediation helps participants limit behaviors such as verbal interruptions, language that one or more of those present may find offensive, or body language that is annoying or might be interpreted as disrespectful. The student may have requests of the other participants and may respond to others' requests for behavior and language that will lead to a more productive working environment.

Confidentiality agreements usually preclude disclosure of the content of mediation discussions by participants in subsequent administrative and judicial proceedings. When a student participates, agreements about confidentiality also ideally address the student's interest in talking with peers about her experience in mediation as well as the educators' interest in limiting disclosure to other students of certain information communicated during the mediation.

During the opening statements, the mediator typically asks the parents and the educators to say what brings them to mediation and what they hope to achieve through the process. The mediator should elicit the same information from the student, in addition to anything else that is important to the student.

The mediator must recognize the need for balance in the mediation process. An inherent power imbalance exists between a student participant and the student's parents or guardians and representatives of the school or district. The student's perspectives and needs ought to be included and considered by all participants in the discussions. The mediator can demonstrate the value of the student's input by soliciting items for the agenda from the student or by affirming the student's acceptance of the agenda developed by the group.

In some cases students may not wish to participate in mediation in spite of the belief of parents and educators that they might be able to make an important contribution. These students may be willing to partially participate, perhaps not sitting at the table but rather doing homework or reading a book elsewhere in the room.

If the discussion catches the student's interest, she would be welcomed into the discussion. The student might also participate in just a portion of the mediation, for example, making an opening statement and then leaving, or limiting participation to sharing his or her opinion when the discussion turns to the student's needs.

Effective participation during the negotiation part of the mediation may be challenging for adults, as well as for students. Events outside the process (a family crisis, work-related issues, not taking medication, etc.), as well as distractions during the process (need for a bathroom break, plummeting blood sugar or nicotine

levels, etc.), can affect anyone's ability to effectively participate in the mediation. Scheduling breaks and check-ins to see how all participants are doing and then adjusting as needed can be helpful. "Time outs" allow participants to de-escalate emotions, gather their thoughts, and gain new perspective. These strategies work for parents and educators as well as for students.

During the final negotiation of the agreement, the mediator needs to challenge each detail for its clarity and feasibility. Each person must be willing and able to do her part to implement the agreed-upon course of action. The successful implementation of a mediation agreement requires the student to keep his commitments. Many mediators routinely facilitate a discussion of "fall back plans" to reduce the likelihood that a problem with one or more parts of the plan will cause the entire agreement to unravel. For example, if the student agrees to a voluntary "time-out" in the principal's office, what will she do if the principal's office is vacant and locked?

Post-mediation:

Mediated agreements more often fail to be implemented because they are unclear, imprecise, or unrealistic, rather than because the participants intentionally disregard them. When the student is a mediation participant, her commitment to a follow-up process may improve the implementation. After a few days or weeks, the student may have a clearer idea of the actual requirements for making the agreement work and of any necessary adjustments that need to be made. Pre-arranged periodic reviews of mediation agreements can provide opportunities for fine-tuning and additional student input. Offering opportunities for the student to proactively request changes may prevent self-doubt and discouragement that might result from his failure to fulfill commitments made in the mediation. Such reviews afford the student practice in identifying needs for accommodation and in self-advocacy.

POTENTIAL CHALLENGES TO STUDENT PARTICIPATION

Issues specific to youth and to youth with disabilities may complicate the process of including students in their special education mediations. This section will describe some of these potential challenges and explore ways to respond that can increase student involvement to the maximum extent appropriate.

Capacity to Participate:

Barriers to capable and effective participation may include unwillingness to participate, lack of developmental and cognitive capacity, and emotional immaturity. Some students will be able to fully and effectively participate in the mediation process. These students may be very capable, for example, of articulating a plan for comprehensively and affordably meeting their personal support needs or detailing the limitations in the accommodations they were provided during an important assessment. Other students' participation may be more fundamental and limited, perhaps at the level of declaring their preference for a vocational placement that is indoors or outdoors. For younger or immature students and those with attention and behavioral problems, the ability to focus on discussions and maintain appropriate behavior may be very limited. Some students may not be capable of participating at all.

As discussed earlier, the best time to identify the appropriate degree and manner of student participation is before the mediation session begins. The flexibility of the mediation process allows for an almost infinite variety of adaptations if inclusion of the student is appropriate.

Disagreements Among Mediation Participants:

During mediation discussions and negotiations, participants typically are not in agreement and express differences of opinion, perspective, and desired outcomes. When the disagreement is between the student and his parent or guardian, the agreement-seeking dynamic may be compounded and complicated. Disagreements can be trivial (e.g., which period to take lunch) or significant (e.g., whether a student should have as a goal using public transportation independently). Mediators may find themselves in the position of eliciting input from a student when the parents do not want the student's perspective to be considered.

The presence of the student provides the opportunity to address discrepancies between the interests expressed by the student and those of the parent in order to ensure a durable resolution of the issues at hand. The mediator may choose either to work with them in a joint session or to meet in private caucus and conduct "a mediation within a mediation" between the parents and student.

A different dilemma occurs when parents disagree with each other, or when educators and service providers disagree with each other. Disagreements among adults may aggravate acting out behaviors or non-cooperation by students, especially those with emotional or behavioral disabilities. Watching for this, the mediator may call for caucuses of varying combinations of participants to address these disagreements privately.

Finally, parents and educators may disagree and yet want to present a united front when they make decisions about a student's educational program. A student's awareness of a lack of adult consensus could contribute to uncertainty as to expectations and consequences, which could undercut programmatic effectiveness and anticipated benefits. Mediators may choose to conduct separate meetings with all adults to unify their perspective and then involve the student in any additional discussions. Alternately, the participants might agree before the mediation begins that the student will participate in part, but not all, of the mediation.

Coercion and Forced Agreement:

Students, even those who are quite forceful and self-assured, can find themselves at an extreme disadvantage in the mediation process when the adults align around a course of action that the student finds disagreeable. When everyone else agrees, it can be very difficult to espouse a different perspective. If the pressure of being the only participant to hold a different viewpoint is not sufficient to secure a concession, adults may employ strategies that range from threat ("If you aren't going to go along with this, then we're not going to be able to continue to work so hard on your behalf") to offering incentives that may be disproportionate ("If you go ahead and take the job mucking stalls, we'll swing by for some ice cream after the meeting"). Students who don't feel comfortable making their perspective known may be held accountable in the future by adults who point out that if they had a concern with an agreement, then they should have stated it in the mediation. Their silence at the mediation table in effect binds them to the terms of the agreement reached there. Unfortunately, students may offer to go along with an agreement because they find the discussion upsetting rather than because they find the agreement acceptable. The psychosocial impact on a student of participation in a troubling mediation experience may result in greater costs than benefits.

Mediators have a responsibility to lighten the pressure on the student and create opportunities for the student to thoughtfully evaluate her situation, ensuring the student's ability to participate throughout the process.

Many factors may be considered when identifying an appropriate intervention, including the student's age and capacity and the significance of the issue. In some cases, a caucus between the parents and student might be an appropriate response. The mediator may also want to meet privately with the student if he is being overpowered or is having difficulty participating. If adult participants object to the mediator caucusing privately with the student, the mediator should elicit and address the basis for the concerns and secure agreement from all participants before proceeding with the caucus. Other issues might also arise when the mediator meets privately with the student.

It is the mediator's task to encourage all participants to carefully consider proposed agreements and identify potential pitfalls or aspects of the agreement that may be difficult to honor. The mediator should be particularly attentive to any sense of reservation on the part of a student participant who may be reluctant to disrupt or delay the agreement by expressing her hesitancy. Attending to unvoiced concerns as well as stated disagreements usually results in increased commitment by all participants and therefore a more durable and comprehensive final agreement.

Student Participation in Written Mediation Agreements:

The culmination of a mediation session in which the participants reach agreement is a written document. In cases where the student has reached the age of majority, the student may sign the agreement as his own principal. Otherwise, written mediation agreements are entered into between parents and educators. In some instances, agreements between adults may be more durable if they are not contingent upon student implementation. One approach for including the student in this part of the process is to create two separate documents: one document incorporating the agreement between the adults and another incorporating the student's commitments, which is signed by the student with the adults signing as witnesses.

Withholding of Information:

In the presence of the student, parents and educators may withhold information essential to reaching a comprehensive and durable agreement. Teachers and service providers may hesitate to make certain observations about the student's abilities or conduct. Administrators may feel it is inappropriate to discuss the child's weaknesses or behavioral issues in front of the student. Parents may feel that it is disloyal to openly disagree with comments or preferences expressed by their child. The challenge for both the mediator and the participants is to ensure that all important information relevant to prospective decisions is expressed in a respectful manner. In some cases, the student might be excused during the presentation of particularly sensitive information, or the mediator might employ a caucus involving some or all of the adults. One outcome of the caucus might be an agreement about whether and how to present the information to the student.

Potential for the Student to Unnecessarily Accept Responsibility for Failed Agreements or Unmet Objectives:

For any number of reasons, goals may not be met and agreements may not be kept. A potential downside of student participation is that a student might hold himself disproportionately responsible for any failures and blame himself in ways that are destructive over the short or long term. It is important that students and other participants be encouraged to view any potential failure of a mediated agreement as a failure of the plan, not a failure of the student. A mediator should be alert for any indication that the student is accepting more responsibility than is reasonable or consistent with her ability and role. Every effort should be made to ensure that students view an unsuccessful implementation as an isolated and remediable incident and not as an emerging theme for which they are solely culpable. As suggested earlier, pre-arranging periodic reviews of the agreement can create opportunities for input from the student that can inform mid-course corrections, thus increasing the potential for ultimate success.

CONCLUSION

Including students with disabilities in their special education mediations has many potential advantages. The mediation process, at its best, offers all interested stakeholders the opportunity to share perspectives and see those perspectives considered and reflected in any final agreement. The student whose educational program is being debated has more to gain or lose in the mediation process than any other participant. An optimal mediation process will include the student to the maximum extent that is practical and meaningful. Such mediations will lead to agreements that reflect student preference, or at least have the benefit of student input. The intuitively and experientially based hypothesis of this paper is that student participation in mediation is beneficial. Research is needed to further investigate and examine this premise.

In the extreme case, student participation may make the difference between a student looking to the future with enthusiasm or feeling consigned to a life that bears no resemblance to the one he or she desires. It is the authors' hope that this paper will stimulate discussion within the community of families, educators, and dispute resolution practitioners about practices that will lead to increased and meaningful participation of students in the mediation process. There is a fundamental truth to the maxim that has been embraced by advocates within the developmental disabilities community: *"Nothing about me without me."*

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APPENDIX A

Before and After the Mediation Process

Pre-mediation: The initial step in the mediation process is known as *intake* and/or *case development*.

This involves:

- (a) gathering information from the potential participants about the situation,
- (b) providing them with information about the mediation process and educating them about its possible benefits and limitations,
- (c) helping interested individuals decide whether mediation, as conducted in the program available to them, offers an opportunity to resolve the dispute, and
- (d) making sure that for each of the above, the student is at least considered, if not included.

The following are some questions for eliciting information about the situation and identifying those who must participate in any successful mediation:

- (a) What is the problem?
 - Who is involved in the problem?
 - Who needs to be involved for a solution to be reached and carried out?
 - What is the nature of the working relationships among the potential participants?
 - What efforts have been made thus far to resolve the problem?
 - Does any potential participant require accommodations in order to participate?
 - If the student will not participate in the session, how can participants ensure the student's interests are heard?

Information about the mediation process must reflect the process that will be available and might include the following:

- (b) Mediation is a voluntary process. No one is required to participate.
 - The mediation participants are the decision-makers, not the mediator.
 - Any agreement reached must be satisfactory to all participants.
 - Mediation is a future-focused, problem-solving process.
 - Mediation does not determine blame or assign fault.
 - Mediation is simpler, faster, and less costly than a due process hearing.
 - The mediation process may be emotionally demanding.
 - A mediated agreement does not establish a legal precedent.
 - Participation in mediation does not waive or delay other rights including, the right to request a due process hearing or file a complaint.

Mediators help potential participants consider whether mediation is the right process for resolving the issue at hand. Some considerations include:

- (c) Is this a situation where relationships have deteriorated and trust has eroded?
 - Are all the people necessary to implement a solution willing to participate?
 - Is each participant able to articulate concerns and negotiate agreements?
 - Would the additional presence of a parent advocate, an attorney, or a substantive expert make the process more productive, efficient, or effective?
 - Is establishing a legal precedent important?

Post-mediation: Mediation systems often include follow-up to the actual face-to-face session. Questions about implementation of mediated agreements can often be addressed by creating a process for checking in with each participant at a pre-arranged time following the conclusion of the mediation negotiations. The timing for the check-in should be in accord with the timing for implementation. For example, if an IEP meeting to consider incorporating parts of the mediated agreement into the student's IEP is scheduled, a week or two following the meeting date would be an appropriate time to follow up to see if the meeting was held and if the IEP team chose to incorporate the provisions. Depending on the design of the mediation system, follow-up may be done by the mediator, by the person who did the intake/case development (which might also be the mediator), or by someone else identified in the mediation.