Confidentiality Does Not Automatically Extend to Pre-Mediation Resolution Sessions

by Laura A. Athens

Preservation of confidentiality is a significant advantage of mediation. Confidentiality is designed to encourage frank and open dialogue and collaborative problem solving without fear that statements made during the mediation will be used against a party at a subsequent proceeding. Parties expect that matters discussed during mediation will remain confidential, but this protection does not apply automatically to other alternative dispute resolution (ADR) processes. The Michigan Court Rules protecting confidentiality in mediation do not specifically address early intervention conferences, facilitations and resolution sessions.

Confidentiality Under the Michigan Court Rules

Michigan Court Rules governing civil and domestic relations mediation safeguard confidentiality by mandating that "[s]tatements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial."[1] The rules further provide that "any communications between parties or counsel and the mediator related to the mediation are confidential and shall not be disclosed without the written consent of all parties."[2] The rules contain limited exceptions; the prohibition against disclosure does not apply to: (1) the mediator's report to the court regarding participants, the mediation completion date and whether settlement was reached or further ADR proceedings are contemplated; (2) information that court personnel reasonably require to administer and evaluate the mediation program; (3) information the court needs to resolve mediator fee disputes; and (4) information the court needs to address failure of a party, attorney or other representative to attend the mediation.

The Michigan Court Rules preserve confidentiality of mediations conducted in connection with litigation in the Michigan court system; they do not, however, address the multitude of ADR processes that occur in other forums. Participants in other ADR arenas must determine whether any statute or rule provides for confidentiality or, conversely, requires disclosure. Frequently, a confidentiality agreement is necessary. Mechanisms often are in place to ensure that such agreements are signed before the process begins. For example, the Oakland County Civil Early Intervention Conference (EIC) program requires participants to sign a confidentiality statement. However, the terms of confidential agreements or statements must be carefully examined to ensure that all key aspects of communications are protected and will remain confidential.

A situation may arise in which one party refuses to enter into a confidentiality agreement. Under those circumstances, the party wishing to preserve confidentiality will need to determine whether to forego the ADR process rather than risking disclosure of information at a later proceeding, or to participate without the benefit of confidentiality.

Confidentiality of Special Education Mediation

Even if a statute provides for confidentiality of mediation, one should not assume that the same protection extends to other ADR processes. For example, the Individuals with Disabilities Education Act (IDEA) contains not only voluntary mediation provisions, but also provisions for mandatory early resolution sessions when a parent files a special education complaint.

IDEA and its regulations contain elaborate terms regarding mediation, including an explicit requirement that all mediation discussions "shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding."[3] IDEA also mandates that the school district and parents participate in a "resolution session" within 15 days of the school district's receipt of the parents' request for an administrative due process hearing.[4] A resolution session is not required, however, when a district files a request for a due process hearing.

No Confidentiality Mandate for Resolution Session

The resolution session provides the parties with an early informal opportunity for a face-to-face discussion that may effectively resolve the dispute and prevent the conflict from escalating. The resolution session is mandatory unless the parents and the district agree, in writing, to waive the meeting or agree to participate in mediation. An agreement reached through a resolution session is voidable by either party within three business days of its execution to permit the parties to consult with their respective legal counsel.

IDEA and its regulations are silent as to whether confidentiality applies to the resolution session. Because the statute does not address confidentiality, the Secretary of the United States Department of Education has declined to clarify in the regulations whether confidentiality is required in resolution sessions. The Secretary has noted that nothing in the statute would prevent parties from entering into a confidentiality agreement; however, the state cannot mandate confidentiality as a condition of the parent's participation.[5]

When resolution sessions were added to IDEA in 2004, Congress specifically found that parents and schools should have "expanded opportunities to resolve their disagreements in positive and constructive ways."[6] The legislative history indicates that Congress broadened ADR opportunities in an effort to restore trust and foster cooperation between parents and schools, encourage expeditious resolution of disputes and prevent disagreements from escalating into costly litigation.[7] The legislative history also reveals that the resolution session is designed to encourage communication regarding issues and promote collaboration concerning possible solutions.

When One Party Refuses to Agree to Confidentiality

As a practical matter, uncertainty regarding the confidentiality of resolution sessions frequently is addressed through voluntary entry into a confidentiality agreement signed by the parties. However, problems may arise when one party refuses to sign such an agreement.

Very few cases have addressed the confidentiality of resolution sessions. Judges and hearing officers who have addressed the issue have concluded that nothing in the statute or regulations require that resolution session discussions be kept confidential. They have held that resolution sessions are not confidential unless the parties otherwise agree. Documents and testimony regarding discussions at resolution sessions may be admitted into evidence at due process hearings when there is no confidentiality agreement.

Neither party can force the other to agree to confidentiality as a precondition to participation in the resolution session. Serious consequences may ensue for parents who refuse to participate in a resolution session without a

confidentiality agreement. Regardless of the merits of the underlying case, an administrative hearing officer may dismiss a case based on the parents' failure to participate in the mandated ADR process.

Repercussions Associated with Lack of Confidentiality

Some parents may unwittingly share private information and settlement proposals during a resolution session without knowledge that the district may introduce this evidence at a due process hearing. If parents choose to proceed with a resolution session without the benefit of a confidentiality agreement, statements made and information shared during the session may be used against them in a subsequent formal proceeding. This places parents in the untenable position of having to choose between participating in a resolution session without confidentiality protection or risk dismissal of their case.

The United States District Court of the District of Columbia ruled that notes and testimony regarding discussions during a resolution session should have been admitted into evidence at the administrative due process hearing. The court found nothing in the statute or regulations required that resolution session discussions be kept confidential. The court rejected an analogy to Federal Rule of Evidence 408, which makes settlement offers inadmissible in court, finding that the resolution session in that case was not a settlement negotiation.[8]

A state administrative hearing officer reached a similar conclusion. The parents' attorney argued that notes memorializing discussions at the resolution session were confidential because they were related to settlement. The state administrative hearing officer ruled that the local hearing officer properly admitted the documents into evidence because the resolution session is not confidential, reasoning that had Congress intended resolution sessions to be confidential, it could have included a confidentiality requirement in the resolution session provisions as it had in the mediation provisions.[9]

A local hearing officer dismissed a due process complaint because of the parent's failure to participate in a resolution session. The parent attended an initial resolution session, but declined to continue a second resolution session after the district refused to sign a confidentiality agreement. In dismissing the parent's complaint, the hearing officer reasoned that because nothing in IDEA requires resolution sessions to be confidential, neither party can demand that the other sign a confidentiality agreement as a condition to their participation in a resolution session.[10]

Dismissal of a parent's due process complaint is permitted under IDEA regulations at the conclusion of a 30-day period when the parent refuses to participate and the district has made reasonable efforts to obtain the parent's participation in a resolution session.[11] The only sanction for the district's refusal to participate in a resolution session is that the case against the district may proceed to a due process hearing.[12]

Meaningless Stepping Stone?

It is unclear whether Congress' failure to include confidentiality in the resolution session provisions was an intentional or inadvertent omission. Admitting resolution session discussions into evidence at a due process hearing chills the parties' willingness to share sensitive information, freely exchange concerns and suggest possible solutions for fear that this information may come back to haunt them. Ordering dismissal of a matter because parents are reluctant to participate in a resolution session that does not include confidentiality protections is unfair. The parents' only choice, in such a situation, is to participate in a very guarded and unproductive manner or try to convince district personnel to waive the resolution session and engage in mediation instead.

It is doubtful that Congress intended the parties to simply go through the motions of a resolution session as a meaningless and futile exercise leading to a due process hearing. Protecting the confidentiality of resolution sessions would not undermine any of the purposes of IDEA. Failing to include a confidentiality provision for resolution sessions leads to confusion and defeats the legislative intent to restore trust and foster cooperation between parents and school districts. Extending confidentiality protections to resolution sessions would promote IDEA's preference for

early, voluntary, collaborative resolution of special education disputes.

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Footnotes

1 MCR 2.411(C)(5) ; 3.216(H)(8)
2 MCR 2.411(C)(5); 3.216(H)(8).
3 20 U.S.C. 20 USC §1415(e)(2)(G).
4 20 U.S.C. §1415(f)(1)(B).
5 71 Fed. Regis. 46704 (2006).
6 20 U.S.C. §1400(c)(8).
7 H.R. 1350 Conference Report, Reducing Unnecessary Lawsuits and Litigation in Special Education, November 17, 2004.
8 *Friendship Edison Public Charter School v. Smith*, 561 F. Supp. 2d 74 (U.S. Dist. D.C. 2008).
9 *Homer Central Sch. Dist.*, 47 IDELR 145 (N.Y. SEA 2006).
10 *Marinette Sch. Dist.*, 47 IDELR 143 (Wisc. LEA 2007).
11 34 CFR 300.510(b)(4).
12 34 CFR 300.510(b)(5).

UPDATE:
Disregarded Entities are Back to Being Disregarded for SBT Purposes

by Michael Antovski

In the April issue of LACHES, I wrote an article titled "Check-the Box Regulations are Disregarded for SBT Purposes" that addressed the Court of Appeals decision in *Kmart Michigan Property Services, LLC v. Department of Treasury*, and the position of the Michigan Department of Treasury to retroactively apply the *Kmart* decision to all open tax years for Single Business Tax purposes, requiring all disregarded entities to file a separate SBT return of all open tax years by September 30, 2010.

Presumably due to the public outcry regarding the *Kmart* decision and the Department's position, House Bill 5937 was signed into law effective as of March 31, 2010, reversing the *Kmart* decision. In response to this new law, the Department rescinded its position through the issuance of a Notice on April 12, 2010, which provided, "RAB-1999-9 and RAB 2000-5 reflect the current interpretation of the law regarding the treatment of disregarded entities under the SBT." Accordingly, the laws governing disregarded entities under the SBT prior to the *Kmart* decision are reinstated and disregarded entities are back to being disregarded for SBT purposes.