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Bureau of Special Education FY'13 Memo #1

Date: July 27, 2012

TO: Superintendents of Schools  
Special Education Directors

FROM: Paul Leather on behalf of the  
Office of the Commissioner

Division of Instruction  
Bureau of Special Education

RE: Mediation Protocol and LEA Resolution Sessions  
as part of Special Education Impartial Due Process Hearings

Mediation

The Department of Education has received a number of complaints alleging that the utilization by parties of electronic devices in the mediation room has potentially compromised confidentiality and has allowed the other party to use mediation as discovery.

As stated in RSA 186-C:23, III:

"Alternative dispute resolution proceedings shall be confidential and shall not impair the right of the participants to demand a due process hearing. Information, evidence, or the admission of any party shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed. In addition, the parties shall not introduce into evidence in any subsequent proceeding the fact that there was an alternative dispute resolution proceeding or any other matter concerning the conduct of such proceedings. The authority of the department of education in alternative dispute resolution proceedings initiated under this section shall be limited to the provisions of paragraphs I and II."

Additionally, RSA 186-C:23, IV states:

"There shall be no record made of any alternative dispute resolution proceedings."

In order to ensure discussions that occur at mediation are held confidential and that the session is not used as discovery, all mediated agreements should be finalized by the mediator. Parties who have a draft agreement or language they want inserted into the agreement, may provide such language to mediators on a flash drive or CD so that the language, once agreed to by both parties, can be downloaded onto the mediator's computer. Once the language is downloaded from a party's computer, such information can then be deleted from the party's computer thus alleviating concerns about confidentiality.

Resolution Sessions

The Department of Education has received complaints that resolution sessions have been facilitated by individuals not associated with the school district or parents.

IDEA 2004 allows for the parent and the LEA to determine which members of the Individualized Education Program (IEP) team will attend the resolution meeting. Participants include the parents, the LEA representative who can make decisions on behalf of the school, and any IEP team member who has relevant information about the issue that is being discussed. School districts may not bring an attorney to the resolution meeting unless the parents bring an attorney. Resolution sessions should only be arranged and held by school districts not by contract employees or non-attorney employees/independent contracted employees of a law firm.

Districts should feel free to contact Stephen Berwick at the Office of Legislation and Hearings, 271-2299, if they have any questions about Mediation or Special Education Impartial Due Process Hearings.

BG:BJR