

**Virginia Department of Education  
Department of Special Populations  
Office of Dispute Resolution**

## **035-12 CONFIDENTIALITY IN MEDIATION**

Regulations (8VAC20-81-190.E.3 and 34 *Code of Federal Regulations* (C.F.R.) § 300.506(b)(5) through (b) (8)) require that discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. These regulations further require that any agreement reached contain this language.

While the Office of Special Education Programs (OSEP) at the United States Department of Education has advised the Virginia Department of Education that parties cannot be required to sign confidentiality agreements prior to engaging in mediation, the state and federal regulations governing mediation are clear that discussions occurring during the mediation process are confidential, regardless of whether a confidentiality agreement is signed.

Additionally, the *Code of Virginia* Section 2.2-4119 states that anything in the case files of the mediator and any communications to schedule a mediation are confidential, with some exceptions. Refer to the [Code of Virginia - Chapter 21.2. Mediation](#). This same code specifies that unless otherwise agreed to by the parties, no mediation proceeding shall be electronically or stenographically recorded.

Important things to keep in mind about confidentiality:

- The knowledge a party has before a mediation is continuing.
- The documents parties have before mediation continue to be relevant.
- What is confidential is the **actual conversation, the mediated negotiation, which occurs at the mediation**, with the parties.

This hallmark of mediation practice allows participants to speak freely and openly without being guarded as they explore the issues, generate options, and assess the acceptability utility of possible outcomes.

For special education mediation, be aware that any agreement reached has to have a limited distribution in order to implement it. This means that administrators and teachers who will be involved in the agreement's implementation need to know about the terms.

Updated May 2024