UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
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TECHNICAL ASSISTANCE CIRCULAR
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ADDRESSEES: STATE VOCATIONAL REHABILITATION AGENCIES (GENERAL)
STATE VOCATIONAL REHABILITATION AGENCIES (BLIND)
STATE REHABILITATION ADVISORY COUNCILS
CLIENT ASSISTANCE PROGRAMS
PROTECTION AND ADVOCACY FOR INDIVIDUAL RIGHTS PROGRAMS
REGIONAL CONTINUING EDUCATION PROGRAMS
RSA SENIOR MANAGEMENT TEAM

SUBJECT : What a Designated Client Assistance Program Agency Must Do to Satisfy the Mediation Procedures Requirement

CITATIONS : Sections 102(d), 112(a) and 112(g)(3) of the Rehabilitation Act of 1973, as amended

34 CFR 370.6(b) and 34 CFR 370.43(a) of the Client Assistance Program Regulations

CONTENT : The Secretary of the U.S. Department of Education published final regulations for the Client Assistance Program (CAP) on November 2, 1995 (60 FR 55758). These regulations went into effect on December 4, 1995.

Questions have been raised concerning the requirements related to the use of mediation procedures that are found in the CAP regulations at 34 CFR 370.43(a). The questions cover a range of issues related to mediation procedures, including:

- the definition of mediation,
- when mediation procedures are required, and
- what data must be reported to RSA to comply with these requirements.

Many of the answers are found in the preamble to the final CAP regulations and in the regulations themselves. However, the following additional information may help clarify what is required.

QUESTION: Why did the Secretary amend the definition of mediation to require an independent third party?

ANSWER: As stated in the preamble to the CAP regulations, the Secretary believed that the comments received on the proposed definition of "mediation" indicated a misunderstanding of the difference between "mediation" and "advocacy" and a designated CAP agency's responsibilities to clients and client applicants. See Analysis of Comments and Changes, CAP Regulations (60 FR 55761, second column). For example, some commenters on the proposed CAP regulations argued that a designated CAP agency should be allowed to listen to both sides of a dispute, conduct an investigation of the facts, and attempt "mediation" before "taking the stance of a negotiator." The Secretary disagreed with these comments.

The Rehabilitation Act Amendments of 1992 (1992 Amendments), Public Law 1O2-569 (October 29, 1992), added the words "and advocate for" to section 112(a) of the Act, to make clear that a designated CAP agency is charged under section 112(a) of the Act with advocating the best interests of the client or client applicant. As defined in these regulations, advocacy means to plead an individual's cause or to speak or write in support of an individual. See 34 CFR 370.6(b). Advocating for the CAP client or client applicant means first, and foremost, advocating the client's interests during negotiations, mediation (whether formal or informal), and other alternative dispute resolution procedures, in addition to advocating the client's interests during administrative Proceedings litigation, or other formal legal remedies.

A CAP representative who is an advocate for a CAP client or client applicant may and should continue to advocate on his or her client's behalf during mediation procedures. The fact that the dispute has gone into mediation or any other form of mediation procedures does not mean the CAP representative stops advocating on his or her client's behalf.

The role of a mediator, on the other hand, is to be an independent third party who listens objectively to both sides of a dispute between the client or client applicant and the third party, which in most cases is the State vocational rehabilitation agency or other service provider. A mediator does not take sides. Therefore, the roles of advocate and mediator are mutually exclusive and an individual employee of the designated CAP agency may not assume both roles at the same time in any dispute involving the same client or client applicant, nor assume the role of advocate at one point in time and the role of mediator at another point in time in the same dispute or in different disputes involving the same client.

QUESTION: Does the requirement for the use of an independent third party for mediation apply to all mediation procedures?

ANSWER: The answer depends on the legal or other requirements applicable to other types of mediation procedures in the jurisdiction within which the parties reside or the dispute arose. The term "mediation procedures" includes alternative dispute resolution methods such as arbitration, conciliation, facilitation, fact-finding, mini-trial, or any combination thereof, some of which require a neutral third party who helps the parties resolve their dispute. Only if a designated CAP agency chooses to use mediation or other type of mediation procedure (e.g., arbitration, whether binding or nonbinding) that requires an independent third party must a neutral third party be involved.

However, 34 CFR 370.43(b) includes an exception that allows a designated CAP agency to use one of its own employees under certain conditions, if it decides to use mediation to resolve a dispute involving a CAP client or client applicant. The Commissioner believes the same reasoning that permits a designated CAP agency to use one of its own employees during mediation applies to other forms of alternative dispute resolution that normally require a neutral third party. For example, if the designated CAP agency and the CAP client or client applicant decide to pursue arbitration to resolve a dispute between a CAP client or client applicant and a service provider, an employee of the designated CAP agency may be the arbitrator while another employee may advocate for the client, in the same manner that 370.43(b) permits the use of designated CAP agency employees as mediators and advocates during mediation.

QUESTION: Is negotiating part of "mediation procedures" or "mediation," and does negotiating require the use of an independent third party?

ANSWER: While negotiating is included in the broader category of alternative dispute resolution procedures, 370.43(a) of the final CAP regulations requires a designated agency to implement procedures designed to use both good faith negotiations and mediation procedures to the maximum extent possible before resorting to formal administrative or legal remedies. The Secretary believed that some of the comments on the proposed CAP regulations (which were published on Oct. 8, 1993 [58 FR 52614]) mistakenly equated "negotiation" with "mediation." Negotiating is not equivalent to "mediation" and negotiating does not require an independent third party.

Negotiating on behalf of a CAP client or client applicant simply means attempting to obtain the most favorable settlement for that person. During the course of negotiations, the CAP advocate may and should present to the CAP client or client applicant the pros and cons of the various solutions available to resolve the dispute (including any offers proposed by the opposing party). In many instances, the resolution that an advocate may negotiate for his or her client may be the same as a mediator may propose to the parties in an attempt to assist them to find a solution to their dispute. The key difference between negotiating and mediating, though, is that an advocate is negotiating on his or her client's behalf for the settlement most favorable to the client, while the mediator is simply trying to assist the parties to reach a mutually acceptable solution and does not favor either party.

"Mediation" is included within the terms "mediation procedures" and "alternative dispute resolution." However, unlike negotiation, "mediation" does require an independent third party. No jurisdiction allows an attorney to serve as the-mediator during the mediation of a dispute between the attorney's client and a third party because this is an obvious conflict of interest. Similar logic prevents a CAP representative from advocating on behalf of a CAP client or client applicant and, at the same or future time, serving as a mediator in mediation involving the same client or client applicant. A CAP representative cannot mediate and remain an advocate, because the roles are mutually exclusive.

QUESTION: When is mediation required?

ANSWER: Neither the Act nor the CAP regulations requires the use of "mediation." If a designated CAP agency is able to resolve disputes between its clients and other parties without resorting to formal administrative or legal remedies (e.g., through the use of negotiations), nothing in the Rehabilitation Act of 1973 (Act), as amended, (29 U.S.C. Sections 5701-797b) or in the CAP regulations requires the designated CAP agency to use mediation procedures to resolve those disputes. In addition, to the extent that "mediation" is only one type of mediation procedure, a designated CAP agency may use mediation procedures other than "mediation" (e.g., other alternative dispute resolution techniques such as arbitration, conciliation, etc.) and still meet the mediation procedures requirement in section 370.43(a).

QUESTION: What discretion does a designated CAP agency have in choosing whether to use mediation or other mediation procedures?

ANSWER: The language of Section 370.43(a) ("procedures designed to ensure that, to the maximum extent possible, ... mediation procedures are used before

resorting to formal administrative or legal remedies" [emphases added]) does not establish an inflexible rule that a designated CAP agency must use any one or more specific mediation procedure in all cases. 34 CFR 370.43(a) gives a designated CAP agency wide discretion to decide whether a particular mediation procedure (including mediation) is appropriate, if at all, in a particular case. A designated CAP agency may base its decision to use a particular mediation procedure on the circumstances of the case, including the issues raised and applicable legal deadlines and State administrative requirements.

For example, any one or more particular mediation procedures in a specific situation may not be possible before the designated CAP agency resorts to formal administrative or legal remedies if a statutory, regulatory, or other legal deadline precludes mediation procedures as impractical, or if mediation procedures are otherwise determined to be inappropriate under the circumstances of that particular case. The statutory mandate to use mediation procedures to the maximum extent possible permits a case-by-case determination of the appropriateness of particular mediation procedures and does not establish an inflexible requirement that mediation procedures be used in all cases. Finally, as discussed more fully below, a designated CAP agency also may take into consideration its level of resources (both financial and staff) before deciding whether to use mediation procedures. See Analysis of Comments and Changes, CAP Regulations (60 FR 55763, Discussion, second column).

QUESTION: How will RSA determine whether a designated CAP agency has used mediation procedures to the maximum extent possible before resorting to formal administrative or legal remedies?

ANSWER: RSA will examine the designated CAP agency's written policies and procedures on the use of mediation procedures and review the implementation of these policies and procedures to determine the designated CAP agency's compliance with the mediation procedures requirement. If RSA finds that a designated CAP agency has no written policies and procedures on the use of mediation procedures or has failed to implement these policies and procedures, RSA will discuss this finding with the director of the designated CAP agency and other appropriate staff to determine whether the designated CAP agency has used mediation procedures to the maximum extent possible. RSA may request the designated CAP agency to present evidence to demonstrate that it used mediation procedures to the maximum extent possible before resorting to formal administrative or legal remedies.

For example, the designated CAP agency may present evidence that most of its cases that proceeded to formal administrative or legal remedies did so because individuals came to the designated CAP agency only after requesting a review by an impartial hearing officer pursuant to section 102(d) of the Act or only-after filing a complaint in a court of law or other formal administrative or legal forum. In these cases, it is not possible for the designated CAP agency to use mediation procedures before resorting to formal administrative or legal remedies.

For purposes of determining compliance with the mediation procedures requirement, RSA will be interested primarily in those cases that have gone from the negotiation stage to the formal administrative or legal remedies stage without the intermediate use of mediation procedures. However, as stated above, even in these cases RSA recognizes that deadlines for filing for formal administrative or legal relief and other considerations may preclude the use of mediation procedures.

In addition, other considerations may include the designated CAP agency's level of resources. As more fully explained below, the CAP regulations make clear that a designated CAP agency may take into consideration the level of its resources in determining whether to use mediation procedures.

QUESTION: Who will pay the extra cost of mediation?

ANSWER: The assumption Congress made in passing the mediation procedures requirement in section 112(g)(3) of the Act is that mediation procedures (including mediation) are less costly than formal administrative or legal remedies. Thus, the mediation procedures requirement has been interpreted in a manner that will assist designated CAP agencies to avoid as much as possible the use of more costly formal administrative and legal remedies.

In addition, the CAP regulations make clear, both in the text of ?370.43(a) and in the preamble discussing this requirement, that a designated CAP agency may take into consideration the level of its resources in determining whether to use mediation procedures. This means that if a designated CAP agency does not have the financial or staff resources to use mediation procedures before resorting to formal administrative or legal remedies, it is not required to do so. Also, the CAP regulations make clear that a designated CAP agency (including a designated CAP agency that is located within a State vocational rehabilitation agency) may use its own staff to conduct mediation. See 34 CFR 370.43(b). Therefore, a designated CAP agency does not need to hire outside staff to conduct mediation procedures, if it can use its own staff in the manner permitted by the CAP regulations.

Finally, the statute and regulations are silent as to which party pays for mediation procedures. Therefore, whether the designated CAP agency, the opposing party (e.g., State vocational rehabilitation agency or other service provider under the Act), or both pay the cost of the use of mediation procedures is a matter to be decided by the parties. However, it may be beneficial for the designated CAP agency to develop agreements with the State vocational rehabilitation agency(ies) or other providers ahead of time to facilitate this situation.

INQUIRIES: RSA Regional Offices

Fredric K. Schroeder, Ph.D.
Commissioner

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Regions I, IV, V, VIII and X